No. 79-1517

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERATED DEPARTMENT STORES, INC., *et al.*,
Petitioners,

v.

MARILYN MOITIE AND FLOYD R. BROWN, ETC.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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DOCKET ENTRIES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-76-1110-SW ["*Moitie I*"]
MARILYN MOITIE, individually,
and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC.,
d/b/a I. MAGNIN & CO., and BULLOCK'S
NORTHERN CALIFORNIA;
SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE;
and DOES I THROUGH XX,

Defendants.

Date 1976	PROCEEDINGS
June 1	— Petition for Removal from Superior Court, County of Santa Clara, (their P30343) together with copy of summons & complaint; no process (copy to MDL panel).
June 1	— Order — conference on 9-16-76 at 9 a.m.
June 1	— $250 Removal Bond.
June 1	— Defendants' Notice of filing Petition & Bond on removal.
June 2	— Defendants' notice of motion & motion for Order extending time to respond to complaint: Affidavit of Fousekis; Affidavit of Miller; Memo of Points & Authorities; Proposed Order.
June 2	— Stipulation & ORDER shortening time for hearing on above motion to 6-3-76 at 9 a.m.
June 3	— Proof of Service of order re conference on 9-16-76.
June 3	— ORDER extending to 6-22-76 defendants' Federated Dept. Store & Saks's time to respond to complaint.
June 3	— MINUTES: Defendants' motion for order extending time to respond to complaint GRANTED; hearing continued to 7-22-76 at 9:00 a.m.
June 21	— ANSWER of defendant Saks & Co.
June 22	— ANSWER & Counterclaim of defendant Federated Dept. Stores, Inc., & Jury Trial DEMAND.

Date 1976	PROCEEDINGS [*Moitie I*]
June 24	— ORDER: Case determined to be related to C-76-867-SW & C-76-869-GBH.
June 24	— Government's Notice of Motion & Motion to quash subpoena, or for a protective order: Memo of points & authorities; Exhibit A; Proposed form of order.
June 25	— Affidavit of Charles Lamont re defendants' motion for stay or, in the alternative, to postpone deposition.
June 25	— Defendant Saks's certificate of service.
June 25	— Defendants' notice of motion and motion for stay pending 1st pretrial conference or, in the alternative, to postpone deposition; Lodged stipulation & proposed order shortening time to hear motion; Lodged stipulation & order re pretrial conference.
June 25	— ORDER — pretrial conference scheduled for 7-21-76 vacated (SW).
June 28	— Lodged Government's notice of motion.
July 6	— Defendant Saks' amendment to conditional counterclaim.
July 7	— ORDER — Case deemed to be related to: C-76-867; C-76-869; C-76-1363 (SW).
July 14	— Plaintiffs' reply to conditional counterclaim of defendant Saks.
July 14	— Plaintiffs' reply to counterclaim of defendant Federated.
July 19	— ORDER relating case to: C-76-1429-SC, C-76-1363-SC, & cases in related case order of 6-24-76 (C-76-867-SW & C-76-869-GBH).
July 23	— Defendants' Notice of Motion & Motion to dismiss.
Aug. 6	— Plaintiffs' memo in opposition to defendants' motion to dismiss.
Aug. 11	— Plaintiffs' certificate of service by mail of memorandum in opposition.
Aug. 26	— ORDER: Pre-Trial Conference set for 12-9-76 at 9:00 a.m. and Trial on 3-21-76 at 10:00 a.m. (SW).
Aug. 30	— ORDER: Related Case to C-76-1210-RHS, C-76-869-SW, C-76-867-SW, C-76-1363-SW, and C-76-1429-SC, and reassigned to Judge Williams (SW).

Date 1977	PROCEEDINGS [*Moitie I*]
Jan. 11	— JUDGMENT ENTERED against plaintiffs in favor of defendants (SW); 1/17/77.
Mar. 23	— Related Cases: C-76-867-SW; C-76-869-GBH; C-76-1429-SW; C-76-1210-SW; C-76-1671-SW; C-76-1110-SW; C-76-1363-SW; C-77-577-SW.
Feb. 25	— Letter from Plaintiffs' counsel re appeal record (see C-76-1429-SW).
Sept. 12	— Original and one copy of reporter's transcript of 6/3/76.

No. C-76-1210-SW ["*Brown I*"]

Floyd Brown, individually,
and on behalf of others similarly situated,
Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC.,
d/b/a I. MAGNIN & CO., and BULLOCK'S
SOUTHERN CALIFORNIA;
SAKS & COMPANY; d/b/a SAKS FIFTH AVENUE,
Defendants.

Date 1976	PROCEEDINGS
June 15	— COMPLAINT; issued summons (copy to MDL panel).
June 15	— Order for private service — ABC Legal Process Service.
June 22	— ANSWER & Counterclaim of defendant Federated Dept. Stores, Inc., & Jury Trial DEMAND.
July 9	— ANSWER of defendant Saks.
July 14	— Plaintiffs' reply to counterclaim of defendant Federated Dept. Stores.
July 14	— Plaintiffs' reply to conditional counterclaim of defendant Saks.
July 19	— ORDER for preliminary pretrial on 9/1/76 at 11:45 a.m.
July 12	— Plaintiffs' notice of related cases (cases unnamed).
July 23	— Plaintiffs' supplemental notice of related cases (cases: 76-869; 76-867; 76-1110; 76-1363; 76-1429).

Date 1976	PROCEEDINGS [*Brown I*]
Aug. 11	— Received defendant Saks' stipulation & proposed order for continuance of preliminary pretrial conference.
Aug. 16	— Stipulation & ORDER for continuance of preliminary pretrial conference to 9-15-76 at 11:45 a.m.
Aug. 30	— ORDER: Related Case to C-76-869-SW, C-76-867-SW, C-76-1363-SW, C-76-1110-SW, and C-76-1429-SC (SW) and reassigned to Judge Williams.
1977	
Jan. 13	— ORDER: both related cases are dismissed in entirety (SW).
Jan. 13	— JUDGMENT ENTERED, 1/17/77, in favor of defendants & against plaintiffs (SW).
Mar. 28	— Related Cases: C-76-869SW; C-76-867SW; C-76-1363SW; C-76-1110SW; C-76-1429SC; C-77-577; C-76-1671.

No. C-77-0576-SW ["*Moitie II*"]

MARILYN MOITIE, individually,
and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC.,
d/b/a I. MAGNIN & CO., and BULLOCK'S
NORTHERN CALIFORNIA;
SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE
and DOES I THROUGH XX,

Defendants.

Date 1977	PROCEEDINGS
Mar. 21	— Defendants' Petition for removal from Municipal Court of State of Calif. for County of Santa Clara, Palo Alto-Mountain View Judicial District at Palo Alto, their no. 36909 (copy to MDL Panel). No Process copy of summons and complaint.

Date 1977	PROCEEDINGS [*Moitie II*]
Mar. 21	— Defendants' notice of filing petition for removal and bond on removal.
Mar. 21	— Defendants' $250 bond on removal.
Mar. 21	— Defendants' Notice of Related Cases: C-76-867-SW; C-76-869-SW; C-76-1110-SW; C-76-1363-SW; C-76-1429-SW; C-76-1210-SW; C-76-1671-SW.
Mar. 21	— Order setting conference on 7/22/77 at 10 a.m.
Mar. 23	— Stipulation-defendants have until 4/14/77 to answer complaint.
Mar. 29	— Proof of service of order setting conference (order of 3/23).
Mar. 28	— ORDER — Determined to be related to: C-76-867; C-76-869; C-76-1110; C-76-1210; C-76-1363; C-76-1429; C-76-1671, and reassigned to Judge Williams (SW).
Mar. 30	— Status conference set for 7/22/77; reset for 7/19/77 at 9:30 a.m.
April 8	— Defendant Saks & Co. notice of motion and motion to dismiss (see C-577-SW [*Brown II*]): Memo of points and authorities; Exhibits; Proposed Order.
April 11	— Hearing set for Defendants' motion to dismiss on 5/25/77.
April 26	— Plaintiffs' notice of motion; motion to remand with supporting papers and proposed order: Affidavit of Offstein; Memo; Exhibits; Proposed Order.
April 26	— PLAINTIFFS' MOTION TO REMAND reset for 5/25/77 at 10:00 a.m.
May 13	— Defendants Federated Dept. Stores, Saks & Co.'s memorandum of points and authorities in opposition to motion to remand: Exhibits; Proposed order.
May 16	— Plaintiffs' memorandum of law in opposition to Defendants' joint motion to dismiss: Proposed order.
May 20	— Defendants Federated and Saks memorandum in support of motion to dismiss.
May 26	— MINUTE ORDER of 5/25/77: Defendants' motion to dismiss and Plaintiff's motion to remand submitted.

Date 1977	PROCEEDINGS [*Moitie II*]
July 6	— JUDGMENT: for Defendant, entered 7/7/77 (SW).
July 6	— ORDER: Denying plaintiffs' motion to remand and granting Defendants' motion to dismiss (SW).
July 7	— Mailed Judgment and Order to counsel of record.
Aug. 3	— Plaintiffs' notice of appeal: Notice sent to counsel of record; Court of Appeals; Court Reporter.
Aug. 9	— Plaintiffs' designation of appeal; Statement of Issues on Appeal.
Aug. 12	— Defendants' request for transcript and designation of records on appeal (copy to reporter).
Sept. 12	— Made, mailed Record on appeal to Ninth Circuit Court of Appeals.

No. C-77-0577-SW ["*Brown II*"]
FLOYD R. BROWN, individually,
and on behalf of others similarly situated,
Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC.,
d/b/a I. MAGNIN & CO., and BULLOCK'S
NORTHERN CALIFORNIA;
SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE;
AND DOES I THROUGH XX,
Defendants.

Date 1977	PROCEEDINGS
Mar. 21	— Petition for Removal Antitrust; no process.
Mar. 21	— Notice of Filing Petition for Removal & Bond on Removal.
Mar. 21	— Bond on Removal ($250.00).
Mar. 21	— Defendants' Notice of Related Cases to: 76-867; 76-869; 76-1110; 76-1363; 76-1429; 76-1210; 76-1671.
Mar. 23	— Stipulation extending time to 4-14-77 for Defendants to Answer Complaint.
Mar. 28	— DETERMINED TO BE RELATED TO: C-76-867; 76-869; 76-1110; 76-1363; 76-1429; 76-1210; 76-1671. (SW & RFP).

Date 1977	PROCEEDINGS [*Brown II*]
April 8	— Defendant Saks & Co. notice of motion and motion to dismiss: Memo of points and authorities: Table of contents; Table of authorities; exhibits; Proposed Order.
April 11	— Hearing set for Defendants' motion to dismiss on 5-25-77 at 10:00 a.m.
April 26	— Plaintiffs' notice of motion; motion to remand with supporting papers and proposed order: Affidavit of Offstein; Memorandum; Exhibits; Proposed order.
April 26	— PLAINTIFFS' MOTION TO REMAND reset for 5-25-77 at 10:00 a.m.
May 13	— Defendants' motion to remand, see C-77-576-SW [*Moitie II*].
May 16	— Plaintiffs' opposition to defendants' motion to dismiss, see C-77-576-SW [*Moitie II*].
May 20	— Defendants' Federated and Saks memorandum in support of motion to dismiss. See C-77-576-SW [*Moitie II*].
July 6	— JUDGMENT: for Defendant, entered 7-7-77. See C-77-576-SW [*Moitie II*].
July 6	— ORDER: Denying plaintiffs' motion to remand and granting Defendants' motion to dismiss (SW). See C-77-576-SW [*Moitie II*].
Aug. 3	— Plaintiffs' notice of appeal: Notice sent to counsel of record; Court of Appeals, Court reporter.
Aug. 9	— Plaintiffs' designation of appeals; statement of Issues on Appeal.
Aug. 12	— Defendants' request for transcript and designation of records on appeal. (Copy to reporter.)
Sept. 12	— Made, mailed Record of Appeal to Ninth Circuit Court of Appeals.
Sept. 16	— Plaintiffs' receipt for record on appeal. See C-77-576-SW [*Moitie II*].
Sept. 19	— Defendants' receipt for record on appeal. See C-77-576-SW [*Moitie II*].
Sept. 21	— Receipt from Ninth Circuit for record on appeal. See C-77-576-SW [*Moitie II*].
Nov. 30	— Plaintiffs' bill of cost. See C-77-576-SW [*Moitie II*].
Dec. 4	— Defendants' Objection to bill of cost.

Date 1980	PROCEEDINGS [*Brown II*]
Feb. 25	— Certified Copy of Ninth Circuit Court of Appeals: Judgment of District Court reversed and remanded. Costs on appeal will be borne by the respective parties and none will be taxed. 9th CCA ORDER: Rehearing — DENIED. 9th CCA ORDER: Memo Disposition of 11-15-79 "Withdrawn"; attached Opinion substituted.
Feb. 25	— Clerk's Notice: Spreading the Mandate.
Mar. 7	— Clerk's Notice: Spreading the Mandate returned.
Mar. 11	— Stipulation & ORDER: (1) 1st pretrial conference previously set for 3-18-80 shall be held on 4/15/80 at 9:30 a.m.; (2) Neither party shall be required to file any further pleadings until after pleading schedule is established at 1st pretrial conference.
May 5	— ANSWER & CONDITIONAL COUNTERCLAIM by defendant Saks & Company.
May 5	— ANSWER & COUNTERCLAIM of defendant Federated Department Stores, and JURY TRIAL DEMAND.
May 6	— PRETRIAL ORDER NO. 1.
May 27	— PLAINTIFFS' ANSWER TO COUNTERCLAIM.
May 28	— ANSWER by plaintiffs' & COUNTERCLAIM to defendants' Counterclaim.
June 16	— RECEIVED: Stipulation and proposed order re discovery.
June 26	— STIPULATION & ORDER: Schedule is modified re discovery, as per order.
Sept. 5	— Received letter of counsel for defendant Federated, confirming continuance of status conference set for 9-24-81 until 6-16-81 at 9:00 a.m.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

C 76-1210

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY; d/b/a SAKS FIFTH AVENUE,

Defendants.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE FEDERAL ANTITRUST LAWS

(JURY DEMANDED)

(Filed June 15, 1976)

I

Jurisdiction And Venue

1. This complaint is filed and these proceedings are instituted against these defendants for violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. §1), entitled "An act to protect trade and commerce against unlawful restraints and monopolies"; commonly known as the Sherman Act. Plaintiffs seek trebled damages and injunctive relief under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. §1337.

2. Each of the named defendants or its agents or co-conspirators maintains offices, transacts business, or if found within the Central District of California and is within the jurisdiction of this Court for purposes of service of process.

Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Central District of California. The interstate trade and commerce described hereinafter is carried on, in part, within the Central District of California.

3. Plaintiff brings this action on behalf of himself and on behalf of all persons similarly situated in Los Angeles and Orange Counties, State of California. The classes which plaintiff represents are composed of the following:

(a) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from I. Magnin on a charge basis;

(b) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from I. Magnin on a check or cash basis;

(c) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from Bullock's Southern California on a charge basis;

(d) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from Bullock's Southern California on a check or cash basis;

(e) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from Saks Fifth Avenue on a charge basis;

(f) All persons residing in Los Angeles and Orange Counties who during the period from 1963 to present have made retail purchases of women's clothing from Saks Fifth Avenue on a check or cash basis.

The members of the plaintiff classes are so numerous that joinder in this action is impracticable. The claims of the members of the plaintiff classes, including those of the named plaintiff, involve common questions of law and fact which predominate over any questions affecting only individual class members, and a class action is superior to other methods for the fair and efficient adjudication of this action. The named plaintiff is a purchaser of women's clothing from I. Magnin, Bullock's Southern California, and Saks Fifth Avenue. The claims of the named plaintiff are typical of those of the other members of the plaintiff will fairly and adequately protect the interests of the plaintiff classes.

II

Plaintiff

Plaintiff Floyd Brown is a resident of Laguna Niguel, California.

III

Defendants

Federated Department Stores, Inc. ("Federated") is hereby made a defendant herein. Federated is a corporation organized and existing under the laws of the State of Delaware. During the period of time covered by this complaint, Federated has engaged in the retailing of women's clothing in Southern California under the trade name of "I. Magnin & Co." The principal offices of I. Magnin & Co. are located in San Francisco, California. During the period of time covered by this complaint, Federated has also commenced the retailing of women's clothing in Southern California under the trade name "Bullock's Southern California," with principal offices located in Los Angeles, California.

(b) Saks & Company ("Saks") is hereby made a defendant herein. Saks is a corporation organized and existing under the laws of the State of New York, with its principal

place of business in New York City. Saks is a wholly owned subsidiary of Gimbel Brothers, Inc. During the period of time covered by this complaint, Saks has been engaged in the retailing of women's clothing in Southern California under the trade name "Saks Fifth Avenue."

IV

Agents And Co-conspirators

The defendants, and each of them, at all times mentioned herein, were the agents of all other defendants, and each of them, and were acting in the course and scope of said agency. Various other corporations and individuals not made defendants in this complaint participated as co-conspirators with the defendants named in the offenses charged herein and performed acts and made statements in furtherance thereof.

V

Trade And Commerce

The defendants are among the largest retailers specializing in the sale of women's clothing in Southern California. They have an image recognized in the women's clothing industry, and by the consumer, of selling fashionable women's clothing of quality fabrics and favored styling. In 1973, they accounted for approximately $70 million in retail sales of women's clothing in Southern California.

In the retailing of women's clothing, the difference between the cost price of an item and its retail price is known as the "markup." Retailers maintain "markup lists" which show the retail price to be charged for items purchased at a given cost level. These markup lists are used by retailers to price items sold to the consumer.

VI

Offenses Charged

Beginning at least as early as 1963, and continuing thereafter until April 1974, the defendants and co-conspirators engaged in a continuing combination and conspiracy in unreasonable restraint of trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among defendants and co-conspirators to raise, fix, maintain and stabilize prices charged by defendants for the sale of women's clothing in Southern California, including Los Angeles and Orange Counties.

In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) met and engaged in telephone conversations to discuss prospective markups and retail prices for the sale of women's clothing to customers of defendants;

(b) exchanged markup charts used by defendants in establishing the retail price of women's clothing sold to customers of defendants;

(c) established agreed-upon markups and retail prices for the sale of women's clothing to customers of defendants; and

(d) adhered to agreed-upon markups and retail prices for the sale of women's clothing to customers of defendants.

VII

Injury To Plaintiffs

As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinabove alleg-

ed, plaintiff and members of the classes have suffered injury in that they have been forced to pay substantial overcharges in retail purchases of women's clothing.

VIII

Fraudulent Concealment

At all times herein mentioned, the defendants and the co-conspirators took measures to conceal from the plaintiffs and the members of the plaintiff classes the violations hereinabove alleged. The meetings and the exchange of markup charts hereinabove alleged took place in an atmosphere of the strictest secrecy, and were never revealed to anyone other than the representatives of the defendants and the co-conspirators who participated therein. As a result of the defendants' fraudulent concealment of their violations, the plaintiff and the members of the plaintiff classes were unaware of the existence of the claims alleged herein, and could not, by the exercise of reasonable diligence, have discovered the existence of such claims, until the year 1976.

IX

Relief

Plaintiff and members of the classes seek injunctive relief and damages. Plaintiffs and members of the classes have not yet ascertained the precise dollar amount of said damages; when said amount has been ascertained, plaintiff will ask leave of court to amend this complaint to insert that amount herein, which must be trebled as required by Section 4 of the Clayton Act (15 U.S.C. §15).

WHEREFORE, plaintiff prays that the court adjudge, enjoin and decree as follows:

1. That this is a proper class action;

2. That defendants and co-conspirators have engaged in an unlawful conspiracy and combination to restrain trade and

commerce in women's clothing in Southern California, including Los Angeles and Orange Counties, in violation of Section 1 of the Sherman Act (15 U.S.C. §1);

3. That plaintiff and members of the classes have been proximately injured by reason of one or more of the above alleged unlawful acts;

4. That plaintiff and members of the classes recover damages which, when ascertained, must be trebled as required by Section 4 of the Clayton Act (15 U.S.C. §15);

5. That plaintiff and members of the classes be awarded reasonable attorneys' fees and costs of litigation as provided by Section 4 of the Clayton Act;

6. That defendants, and each of them, be permanently enjoined and restrained from each and every one of the unlawful practices alleged in the complaint as provided by Section 16 of the Clayton Act (15 U.S.C. §26);

7. That plaintiff and members of the classes be awarded such other and further relief as the court may deem just and proper.

DATED: June 10, 1976.

LAW OFFICES OF JERROLD
N. OFFSTEIN
JERROLD N. OFFSTEIN
JOHN A. KITHAS
CHARLES LAMONT

SUMMERHAYS & SWOPE
LOWELL V. SUMMERHAYS
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By: /s/ Jerrold N. Offstein
JERROLD N. OFFSTEIN
LOWELL V. SUMMERHAYS
Attorneys for Plaintiffs

Pursuant to rule 38, of the Federal Rules of Civil Procedure, jury trial in the instant matter is hereby demanded.

DATED: June 10, 1976.

LAW OFFICES OF JERROLD
N. OFFSTEIN
SUMMERHAYS & SWOPE

By: /s/ Jerrold N. Offstein
JERROLD N. OFFSTEIN
LOWELL V. SUMMERHAYS
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C76-1210 RHS

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE,

Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANT FEDERATED DEPARTMENT STORES, INC. AND JURY TRIAL DEMAND

(Filed June 22, 1976)

Defendant Federated Department Stores, Inc., by its attorneys, answers the complaint herein as follows:

1. Admits that plaintiff purports to institute these proceedings and seek relief pursuant to the statutory provisions referred to in paragraph 1. Otherwise, defendant denies the allegations of paragraph 1.

2. Admits that agents of defendants transact business within the Central District of California and are within the jurisdiction of this Court for purposes of service of process. Otherwise, defendant denies the allegations of paragraph 2.

3. Admits that plaintiff purports to bring this action for himself and as a representative of classes for all members thereof, but denies that this action may be properly brought as a class action and that plaintiff is a proper representative of any class. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

that plaintiff is a purchaser of women's clothing from I. Magnin & Co., Bullock's Southern California and Saks Fifth Avenue. Otherwise, defendant denies the allegations of paragraph 3.

4. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation of paragraph II.

5. Denies that defendant Federated Department Stores, Inc. engaged in the retailing of women's clothing in Southern California prior to August 29, 1964 and that it does business under the trade name "Bullock's Southern California." Otherwise, defendant admits the allegations of the first paragraph of paragraph III and avers that defendant is engaged in the retailing of women's clothing in Southern California under the trade name "Bullock's," with principal offices located in Los Angeles, California. Upon information and belief, defendant admits the allegations of the second paragraph of paragraph III.

6. Denies the allegations of paragraph IV.

7. Admits that defendant's stores sell fashionable women's clothing of quality and style in Southern California, admits the first sentence of the second paragraph of paragraph V, and admits, upon information and belief, that some retailers have maintained and used "markup lists" which contain an indicated retail price for items purchased at a given cost level. Otherwise, defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph V.

8. Denies the allegations of paragraph VI.

9. Denies the allegations of paragraph VII.

10. Denies the allegations of paragraph VIII and avers that the allegations lack sufficient particularity and do not satisfy the requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

11. Admits that plaintiff purports to seek the relief set forth in paragraph IX. Otherwise, defendant denies the

allegations of paragraph IX. No responsive pleading is required to the speculative allegation that plaintiff will seek leave of court to amend the complaint.

Defenses

As and for additional defenses to the complaint, defendant Federated Department Stores, Inc. states as follows:

First Defense

12. The complaint fails to state a claim upon which relief may be granted.

Second Defense

13. The claims of plaintiff and those whom he purports to represent (hereinafter collectively referred to as "plaintiffs") are barred in whole or in part by the applicable statute of limitations.

Third Defense

14. The claims of the plaintiffs are barred in whole or in part by *laches*.

Fourth Defense

15. The complaint, and each and every claim thereof, is not proper for treatment as a class action, by virtue of the following factors, among others:

(a) There are no ascertainable classes;

(b) The claims of the named plaintiff are not typical of those whom he purports to represent;

(c) The named plaintiff will not fairly and adequately protect the interests of those whom he purports to represent;

(d) There are no sets of facts common to members of the purported classes;

(e) Questions of fact peculiar to each member of the purported classes predominate over facts, if any, which are common to members of the purported classes;

(f) The named plaintiff is not the proper representative of the purported classes;

(g) The named plaintiff is not interested in the subject matter of the within action;

(h) The named plaintiff is not the real party in interest with respect to the subject matter of the within action; and

(i) The alleged classes are not manageable.

Fifth Defense

16. Plaintiffs sustained no damage to their businesses or property by reason of any act of defendant.

Counterclaim

17. This Court has jurisdiction over this counterclaim under the principles of pendent jurisdiction. This counterclaim arises under common law principles.

Parties And Offense Charged

18. Counterclaimant is a corporation organized and existing under the laws of the State of Delaware, with principal offices located in Cincinnati, Ohio. Counterclaimant is engaged in retailing in Southern California under the trade names of "I. Magnin & Co." and "Bullock's."

19. This counterclaim is brought against the named plaintiff and, if they are certified to be proper classes herein, those members of the purported classes described in paragraph 3 of the complaint or any other certified class, who made retail purchases from counterclaimant and failed to pay, in whole or in part, for certain such purchases, the amounts of which are still due, owing and unpaid (hereinafter "counterclaim defendants"). Upon information and belief, thousands of members of the purported classes are counterclaim defendants.

20. Although payment has been duly demanded, counterclaim defendants have failed to pay their indebtedness to counterclaimant.

Damages

21. Each counterclaim defendant is liable to counterclaimant for the amount due, owing and unpaid on purchases made from counterclaimant, the full amounts of which are presently unascertained.

Prayer For Relief

WHEREFORE, defendant and counterclaimant Federated Department Stores, Inc. prays as follows:

1. That the complaint be dismissed with prejudice as to the named plaintiff and all persons whom he purports to represent;

2. That judgment be entered in favor of counterclaimant in the amount of damages determined to have been sustained by counterclaimant;

3. That defendant be awarded its costs of suit herein and reasonable attorneys' fees; and

4. That defendant be awarded such other relief as this court may deem just and proper.

Jury Trial Demand

Defendant Federated Department Stores, Inc. demands trial by jury of all issues so triable in this action.

Respectfully submitted,

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By: /s/ Charles G. Miller
CHARLES G. MILLER

Attorneys for Defendant-Counterclaimant
FEDERATED DEPARTMENT STORES, INC.

DATED: June 22, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-76-1210 RHS

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE,

Defendants.

ANSWER OF DEFENDANT SAKS & COMPANY TO COMPLAINT

(Filed July 9, 1976)

Defendant SAKS & COMPANY (hereafter "Saks") answers the Complaint herein as follows:

1. Answering Paragraph 1, Saks admits that plaintiff purports to institute these proceedings and seek relief pursuant to the statutory provisions set forth in said paragraph. Except as so admitted, Saks denies the allegations of said paragraph.

2. Answering Paragraph 2, Saks admits that defendants have agents for the transaction of business within the Central District of California and are within the jurisdiction of this Court for purposes of service of process. Except as so admitted, Saks denies the remaining allegations of said paragraph.

3. Answering Paragraph 3, Saks admits that plaintiff purports to bring this action on behalf of himself and on behalf of an alleged class of persons, but denies that this action may be properly brought as a class action. Saks is without knowledge or information sufficient to form a belief

as to the truth of the allegations that plaintiff is a purchaser of women's clothing from I. Magnin, Bullock's Southern California, and Saks Fifth Avenue. Saks denies the remaining allegations of said paragraph.

4. Answering Paragraph II, Saks is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph II.

5. Answering Paragraph III, Saks admits the allegations of subparagraph (b) of Paragraph III, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph.

6. Answering Paragraph IV, Saks denies the allegations of said paragraph.

7. Answering Paragraph V, Saks lacks knowledge or information sufficient to form a belief as to the truth of the allegations of said paragraph, except admits that Saks specializes in the sale of merchandise, including women's clothing, and that it has an image recognized in the women's clothing industry and by the consumer of selling fashionable women's clothing of quality fabrics and favored styling.

8. Answering Paragraphs VI, VII, VIII, and IX, Saks denies each and every of the allegations thereof, except admits that plaintiff purports to seek the relief and damages requested and that plaintiff may ask to amend his complaint as alleged in Paragraph IX.

First Affirmative Defense

9. The Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

10. The claims of plaintiff and the alleged class are barred in whole or part by Section 4B of the Clayton Act, 15 U.S.C. §15(b), and such state statutes of limitations as may be applicable.

Third Affirmative Defense

11. The Complaint is barred in whole or in part by laches.

Fourth Affirmative Defense

12. The plaintiff and the alleged class have sustained no damage to their business or property by reason of any act of this defendant.

Fifth Affirmative Defense

13. The plaintiff and the alleged class lack standing to sue with respect to the claims alleged in the Complaint.

Sixth Affirmative Defense

14. The Complaint, and each and every claim thereof, is not proper for treatment as a class action, by virture of the following factors, among others:

(a) There is no ascertainable class;

(b) There are questions of fact peculiar to each member of the alleged class which predominate over facts, if any, which may be common to members of the alleged class;

(c) The alleged class is not manageable;

(d) The plaintiff is not a proper representative of the alleged class;

(e) The claims of plaintiff are not typical of those they purport to represent.

Conditional Counterclaim

Defendant and counterclaimant Saks alleges the following counterclaim against members of the purported class.

15. Saks is a corporation duly organized and existing under the laws of the State of New York with its principal place of business in New York, New York.

16. Saks is engaged in the business of selling merchandise and services at retail to the general public.

17. The Court has not yet determined whether a class action is to be certified in this action and, if so, which persons shall be included in any such class. A portion of the purported class sought to be certified by plaintiff have entered into charge account agreements with Saks pursuant to which they agreed to pay for merchandise and services purchased from Saks in accordance with the terms set forth in the agreement. Many of these charge account agreements also provide that if a customer fails to make the required payment, the entire outstanding balance is due and owing to Saks, and that if Saks refers the customers accounts to an attorney for collection, the customers will pay Saks' attorneys fees and court costs.

18. A significant number of the Saks charge account customers who reside in Los Angeles and Orange Counties are in breach of their charge account agreements with Saks because they failed to pay Saks for their purchases of merchandise and services from Saks in accordance with the terms of their charge account agreements.

19. No part of such indebtedness has been paid to Saks although payment has been duly demanded.

20. Accordingly, Saks has claims against a significant number of the members of the purported class sought to be certified. If a class is certified, upon determination of which persons are in the class, this answer will be amended to the extent required to identify the persons against whom the claims exist and the amount of such claims.

WHEREFORE, defendant and counterclaimant Saks prays for judgment as follows:

1. That plaintiff take nothing by his Complaint and that the same be dismissed with prejudice;

2. That judgment be entered on the Counterclaim of Saks in amounts to be determined plus reasonable attorneys' fees;

3. For its costs of suit;

4. For such other and further relief as this Court may deem just and proper.

DATED: July 9, 1976.

SOLINGER & GORDON
EUGENE H. GORDON
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STEINHART, GOLDBERG,
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JAMES T. FOUSEKIS
DAVID B. ROE

By: /s/ James T. Fousekis
JAMES T. FOUSEKIS

Attorneys for Defendant
SAKS & COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 76-1210 RHS

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I.MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a Saks Fifth Avenue,

Defendants.

REPLY TO COUNTERCLAIM OF DEFENDANT FEDERATED DEPARTMENT STORES, INC.

(Filed July 14, 1976)

Plaintiff Floyd Brown, individually, and on behalf of those similarly situated, replies to the counterclaim of defendant Federated Department Stores, Inc. herein as follows:

1. Replying to paragraph 17, plaintiff denies that this Court has jurisdiction over the counterclaim under the principles of pendent jurisdiction. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegation that the counterclaim arises under common law principles.

2. Replying to paragraph 18, plaintiff admits the allegations of said paragraph.

3. Replying to paragraph 19, plaintiff admits that defendant purports to bring the counterclaim against plaintiff and against others who allegedly made retail purchases from counterclaimant and failed to pay, otherwise plaintiff denies the allegations of the first sentence of paragraph 19 insofar as such allegations are directed at plaintiff, and plaintiff is

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without knowledge or information sufficient to form a belief as to the truth of such allegations insofar as they are directed at other individuals denominated "counterclaim defendants" by counterclaimant. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 19, but denies that any members of the purported classes are counterclaim defendants.

4. Replying to paragraph 20, plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations insofar as such allegations are directed at other individuals denominated "counterclaim defendants" by counterclaimant. Plaintiff denies the allegations of said paragraph insofar as they are directed at plaintiff.

5. Replying to paragraph 21, plaintiff denies that plaintiff is liable to counterclaimant for any amounts due, owing or unpaid on purchases made from counterclaimant. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations insofar as such allegations are directed at other individuals denominated "counterclaim defendants" by counterclaimant.

First Affirmative Defense

6. This Court lacks subject matter jurisdiction over the counterclaim.

Second Affirmative Defense

7. The counterclaim fails to state a claim upon which relief can be granted.

Third Affirmative Defense

8. The claims of counterclaimant are barred in whole or in part by the applicable statute of limitations.

Fourth Affirmative Defense

9. The counterclaim is barred in whole or in part by laches.

Fifth Affirmative Defense

10. Prior to the filing of the counterclaim herein, counterclaim defendants duly paid, satisfied, and discharged the alleged claim of counterclaimant set forth in the counterclaim herein by full payment to counterclaimant.

Sixth Affirmative Defense

11. At all times prior to the filing of the counterclaim herein there existed in the retail clothing business in the City of Los Angeles and surrounding counties in the State of California, including Orange and Los Angeles Counties, a well-established and well-understood custom and usage to the effect that failure by a customer to make the required payment for merchandise or services purchased from counterclaimant pursuant to a charge account agreement would not result in the entire outstanding balance becoming due and owing, as counterclaimant well knew. Any purchases alleged in the counterclaim were made by counterclaim defendants with reference to and knowledge of such custom and usage. Any failure to make payment or any delinquency in payment by counterclaim defendants was in accordance with such custom and usage.

Seventh Affirmative Defense

12. At all times prior to the filing of the counterclaim herein, counterclaimant had full knowledge of any failure to make payment or of any delinquency in payment by counterclaim defendants, and waived its right to timely performance by counterclaim defendants under the charge account agreements between counterclaim defendants and counterclaimant in that counterclaimant elected to treat the charge account agreements as viable and binding and thereafter accepted any late payment from counterclaim defendants as satisfactory and full performance.

WHEREFORE,plaintiff and counterclaim defendants pray for judgment as follows:

1. That counterclaimant take nothing by its counterclaim and that the same be dismissed with prejudice;

2. That counterclaim defendants be awarded the costs of suit herein and reasonable attorneys' fees; and

3. That counterclaim defendants be awarded such other relief as this Court may deem just and proper.

DATED: July 13, 1976.

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By: /s/ Charles Lamont
CHARLES LAMONT

Attorneys for Plaintiff and Counterclaim Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 76-1210 RHS

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE,

Defendants.

REPLY TO CONDITIONAL COUNTERCLAIM OF DEFENDANT SAKS & COMPANY

(Filed July 14, 1976)

Plaintiff Floyd Brown, individually, and on behalf of those similarly situated, replies to the conditional counterclaim of defendant Saks & Company as follows:

1. Replying to paragraph 15, plaintiff admits the allegations of said paragraph.

2. Replying to paragraph 16, plaintiff admits the allegations of said paragraph.

3. Replying to paragraph 17, plaintiff admits the allegations of the first sentence of said paragraph. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in said paragraph.

4. Replying to paragraph 18, plaintiff is without knowledge or information sufficient to form a belief as to the truth of said allegations, but denies any breach by plaintiff.

5. Replying to paragraph 19, plaintiff is without knowledge or information sufficient to form a belief as to the truth of said allegations, but denies any indebtedness to Saks.

6. Replying to paragraph 20, plaintiff is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of said paragraph. No responsive pleading is required to the speculative allegation in the second sentence of said paragraph that defendant and counterclaimant will amend the answer if a class is certified.

First Affirmative Defense

7. This Court lacks subject matter jurisdiction over the counterclaim.

Second Affirmative Defense

8. The counterclaim fails to state a claim upon which relief can be granted.

Third Affirmative Defense

9. The claims of counterclaimant are barred in whole or in part by the applicable statute of limitations.

Fourth Affirmative Defense

10. The counterclaim is barred in whole or in part by laches.

Fifth Affirmative Defense

11. Prior to the filing of the counterclaim herein, counterclaim defendants duly paid, satisfied, and discharged the alleged claim of counterclaimant set forth in the counterclaim herein by full payment to counterclaimant.

Sixth Affirmative Defense

12. At all times prior to the filing of the counterclaim herein there existed in the retail clothing business in the City of Los Angeles and surrounding counties in the State of California, including Orange and Los Angeles Counties, a well-established and well-understood custom and usage to the

effect that failure by a customer to make the required payment for merchandise or services purchased from counterclaimant pursuant to a charge account agreement would not result in the entire outstanding balance becoming due and owing, as counterclaimant well knew. Any purchases alleged in the counterclaim were made by counterclaim defendants with reference to and knowledge of such custom and usage. Any failure to make payment or any delinquency in payment by counterclaim defendants was in accordance with such custom and usage.

Seventh Affirmative Defense

13. At all times prior to the filing of the counterclaim herein, counterclaimant had full knowledge of any failure to make payment or of any delinquency in payment by counterclaim defendants, and waived its right to timely performance by counterclaim defendants under the charge account agreements between counterclaim defendants and counterclaimant in that counterclaimant elected to treat the charge account agreements as viable and binding and thereafter accepted any late payment from counterclaim defendants as satisfactory and full performance.

WHEREFORE, plaintiff and counterclaim defendants pray for judgment as follows:

1. That counterclaimant take nothing by its counterclaim and that the same be dismissed with prejudice;

2. That counterclaim defendants be awarded the costs of suit herein and reasonable attorneys' fees; and

3. That counterclaim defendants be awarded such other relief as this court may deem just and proper.

DATED: July 13, 1976.

LAW OFFICES OF JERROLD N. OFFSTEIN
JERROLD N. OFFSTEIN
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LOWELL V. SUMMERHAYS
DAVID M. SWOPE

By: /s/ Charles Lamont
CHARLES LAMONT

Attorneys for Plaintiff and Counterclaim Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 76 867 SW

DONNA JEAN WEINBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants

No. C 76 869 SW

ELEANOR EISENBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

No. C 76 1110 SW

MARILYN MOITIE,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

No. C 76 1363 SW

SANDRA G. MUSSER,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

No. C 76 1429 SW

JUNE MORGAN,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

Notice Of Notion And Motion Of Defendants Federated Department Stores, Inc. and Saks & Company To Dismiss

(Filed July 23, 1976)

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Thursday, September 16, 1976, at 11:00 a.m., in the Courtroom of the Honorable Spencer Williams, 450 Golden Gate Avenue, San Francisco, California defendants Federated Department Stores, Inc. and Saks & Company will move the Court to dismiss the actions herein for failure to state claims upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion is based upon this Notice of Motion, the Memorandum of Points and Authorities in Support of this

motion served and filed herewith, the Order of this Court filed on June 25, 1976, and all pleadings, files and records herein.

Respectfully submitted,

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MCKENNA & FITTING
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EUGENE H. GORDON
JOHN C. GROSZ

By: /s/ James T. Fousekis
JAMES T. FOUSEKIS

Attorneys for Defendant
SAKS & COMPANY

DATED: July 23, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 76 867 SW

DONNA JEAN WEINBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

No. C 76 869 SW

ELEANOR EISENBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC.,

Defendants.

No. C 76 1110 SW

MARILYN MOITIE,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

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No. C 76 1363 SW

SANDRA G. MUSSER,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

No. C 76 1429 SW

JUNE MORGAN,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

PLAINTIFF MARILYN MOITIE'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

(FILED AUG. 6, 1976)

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I

Introduction And Statement Of Antitrust Policy

To accept the premises of defendants' motion to deny consumers standing to sue is to ignore the very purpose of the Sherman Act. That purpose was succinctly stated by the Supreme Court in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940):

> The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market *to the detriment of purchasers of goods and services*. . . . [Emphasis supplied]

But defendants do not seek to deny all consumers standing to sue for treble damages under section 4 of the Clayton Act (15 U.S.C. §15).[1] Only *non-commercial or retail* consumers are to be excluded from that remedy, purportedly because the individual damage claim of each such consumer is so insignificant that its recovery would be of no real benefit to the claimant.

Unfortunately for defendants, this Policy argument runs afoul of 28 U.S.C. §1337 which gives the district courts original jurisdiction of civil antitrust actions without regard to the amount in controversy. Surely the monetary amount of an antitrust claim cannot be the basis for differentiating between

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[1] Section 4 provides in relevant part:

> Any person who shall be *injured in his business or property* by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. [Emphasis supplied]

antitrust standing for commercial consumers and retail consumers. Otherwise, small commercial consumers should also be precluded from suing for treble damages under section 4 of the Clayton Act. The legislative history of the Sherman Act, however, reveals the intent of Congress to permit access to the federal courts without any jurisdictional limit as to the dollar amount in controversy.[2]

The second policy argument which defendants present is similarly without foundation. The burdens on the administration of justice arising from consumer class actions can be checked before they become intolerable by utilizing the manageability provisions of Rule 23 of the Federal Rules of Civil Procedure. See *Kline* v. *Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974).

Confusing questions of class action manageability with questions of antitrust standing is presumptuous. All retail consumer suits need not necessarily be class actions. "The fact that a successful antitrust suit for damages recovers not only the costs of litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 256 (1972).

Defendants would have this Court deny antitrust standing to all retail consumers because the opportunity to bring class actions exists. Although such litigation has been envisioned,[3] there may also be instances in which small groups of retail consumers join together in antitrust suits for treble damages. The benefit of recovery in their estimation may be worth the

---

[2] See discussion in section IV *infra*.

[3] "Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972).

trouble of legal action. Certainly the burden on the court would not approach that produced by a class action. Yet these prospective litigants would be denied standing to sue if defendants' theory were adopted, merely because the Federal Rules of Civil Procedure make class actions available. Defendants would have this Court unnecessarily eliminate the remedies of certain persons in order to forestall judicial burdens which may never be occasioned by them. The problems which attend Rule 23 cannot be solved by tampering with antitrust standing.

Finally, defendants argue that existing remedies are sufficient. Specifically, they refer to the criminal and civil injunctive actions in the arsenal of the Antitrust Division of the Department of Justice. Although the criminal fine for conviction in antitrust cases is now one million dollars (15 U.S.C. §1), defendants somewhat disingenuously ignore the fact they only received fines of fifty thousand dollars each under the former penalty provision.

Regardless of what action may be taken by the Department of Justice, Congress, in enacting section 4 of the Clayton Act, clearly foresaw that government action alone would be insufficient if the injured are to be made whole again. Even if attorneys are the main beneficiaries of private treble damage actions, they serve as private attorneys general to redistribute funds, in however minute shares, to those who are legitimately entitled to participate in the recovery. Even in these inflationary times with the erosion of the dollar's value, most customers at a grocery store or restaurant would not passively submit to shortchanging. Unhappily for retail consumers, price-fixing is not so readily recognizable as shortchanging. The effect, though, is the same.

There is no good reason why the consumer who bears the economic burden of an antitrust violation should "donate" his overcharge to the offending violator. Yet this is precisely that which defendants suggest because the damage to each

consumer is typically insignificant. Interestingly, defendants do not propose any other use to which the undivided sum of all overcharges could be put for the public's benefit. That defendants should be permitted to retain the overcharges because of procedural difficulties is an outrage.

Recently, the Senate Judiciary Committee observed:

> The economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services. Frequently, such antitrust violations as price-fixing, group boycotts, divisions of markets, exclusive dealings, tie-in arrangements, fraud on the Patent Office, monopolization, attempts to monopolize, conspiracies to limit production, and other violations of the antitrust laws, injure thousands or even millions of consumers, each in relatively small amounts but often on a continuing basis. When everyday consumer purchases are involved (e.g., bread, dairy products, gasoline, etc.), the individual dollar amounts are so small that, as a practical matter, an individual antitrust law suit is out of the question. Similarly, consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers' damages under section 4 of the Clayton Act. Yet, if an antitrust violation results in an overcharge of but 10 cents on a relatively low-priced consumer item, and 500 million such items are sold, the aggregate impact of the conspiracy upon the consumers and the illegal profits of the conspirators are hardly insignificant — at least $50 million.

Report of the Senate Judiciary Committee, *The Antitrust Improvements Act of 1976*, S.Rep. No. 94-803, 94th Cong. 2d Sess. 39-40 (1976).

Policy considerations dictate that retail consumers have standing to sue under section 4 of the Clayton Act. The policy

that the individual should not be unfairly treated by the federal court system because his claim may be small is a valid one. The policy that antitrust violators should not keep the fruits of their violation is important if the concept of justice is not to be eroded. Both policies should be worth the judicial effort necessary to cope with burden of an antitrust suit.

Moreover, as the following discussion of law demonstrates, there is sound legal authority for permitting retail consumers standing to sue for treble damages.

II

Non-Commercial Or Retail Consumers Have Standing To Sue For Treble Damages Under Section 4 Of The Clayton Act

According to defendants' misplaced reliance on recent Supreme Court and Ninth Circuit decisions,[4] only consumers with commercial interests and enterprises can bring private treble damage actions under section 4 of the Clayton Act. Defendants' motion requests that this Court hold contrary to Supreme Court authority which has stood for seventy years.

Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65 (1906) held that the City of Atlanta could maintain an action under section 7 of the Sherman Act[5] for a violation of the antitrust laws where the municipality was led to purchase iron pipe at an excessive price. He said:

> The facts give rise to a cause of action under the act of Congress. The city was a person within the meaning of §7 by the express provision of §8. *It was injured in its*

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[4] A discussion of *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972) and *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir.) *cert. denied* 414 U.S. 1045 (1973) follows in section III, *infra*.

[5] Section 4 of the Clayton Act is a re-enactment of Section 7 of the Sherman Act.

> *property, at least, if not in its business of furnishing water*, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. [Emphasis supplied]

27 S.Ct. at 66.

The Court went on to say:

> There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law.

Id.

Finally, Justice Holmes made it quite clear that to sue for antitrust damages the injury need not impinge upon a specific type of property. He distinguished the words of the Sherman Act from those used in the Tennessee statute of limitations referring to "injury to personal property":

> But there is a sufficiently clear distinction between injuries to property and "injured in his business or property", the latter being the language of the act of Congress. A man is injured in his property when his property is diminished. He would not be said to have suffered an injury to his property unless the harm fell upon some object more definite and less ideal than his total wealth. A trademark, or a trade name, or a title, is property, and is regarded as an object capable of injury in various ways. But when a man is made poorer by an extravagant bill we do not regard his wealth as a unity, or the tort, if there is one, as directed against that unity as an object. We do not go behind the person of the sufferer. We say that he has been defrauded or subjected to duress, or whatever it may be, and stop there.

Id. at 67.

The unmistakeable thrust of these remarks is that the injured property for which antitrust damages are sought need not be characterized as a specific type of property, whether

commercial or otherwise, but rather the fact of the overcharge is of primary significance. Therefore, a consumer who has suffered an overcharge by reason of an antitrust violation has incurred an injury to property within the meaning of the Supreme Court's decision in *Chattanooga Foundry & Pipe.*

The distinction between "business" and "property" alluded to in *Chattanooga* was directly addressed in *Waldron* v. *British Petroleum Co., Ltd.*, 231 F.Supp. 72 (S.D.N.Y. 1964). Referring to section 4 of the Clayton Act the court said:

> The statute explicitly uses the words "business or property" in the disjunctive. Congress intended this distinction to be meaningful. The word "property" has wider scope and is more extensive than the word "business". Less is required to prove "property" than to prove "business".
>
> The statute does not set up a qualitative or quantitative test to determine the existence of "property". Nor does the statute contain a built-in definition.
>
> The word "property" is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether plaintiff has "property" involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses "property".

Waldron, supra, 231 F.Supp. at 86. Accord: *Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629, 634 (5th Cir. 1966); *Utah Gas Pipelines Corp.* v. *El Paso Natural Gas Co.*, 233 F.Supp. 955, 964-965 (D.Utah 1964). The court then held that a contract to import oil was property within the purview of section 4. Although plaintiff had failed to demonstrate to the court his ability to engage in the oil business and therefore

could show no injury to "business", the inherent value of the contract entitled him to the protection afforded by section 4 of the Clayton Act. *Id.* at 87.

Defendants submit that both *Chattanooga* and *Waldron* involved commercial interests or enterprises. Thus, the purchase of pipe was for use in the city's waterworks, and the contract was one for the importation of oil for resale. Because the property was for commercial use, defendants argue, then it is entitled to the protection of the antitrust laws and damage actions for violations thereof. This theory emphasizes the use to which the property is put as the determining factor in deciding whether its possessor has standing to sue under section 4. Defendants cite no authority for such a proposition.

That a court should protect only a commercial consumer and not a non-commercial consumer is contrary to Supreme Court law. Defendants might argue that the commercial consumer is in competition and the *raison d'etre* of the antitrust laws is to protect and promote competition. See, e.g., *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752, 758 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973). On the other hand, the non-commercial consumer does not utilize the product or service in any competitive venture and therefore is not one for whom antitrust protection was primarily designed.

This antitrust analysis, which seems to be the only plausible substantive explanation for discriminating between commercial and non-commercial consumers, cannot account for the facts of either *Chattanooga Foundry & Pipe* v. *City of Atlanta* or *Hawaii* v. *Standard Oil Co.* In both cases, plaintiff was a governmental entity which had standing to sue for overcharges on purchases made in its proprietary capacity. *Chattanooga, supra*, 27 S.Ct. at 66; *Hawaii, supra*, 405 U.S. at 262. But a governmental entity such as a city or state government, no matter what functions it undertakes on behalf of its residents or citizens, can hardly be deemed to be in competition. Neither the City of Atlanta nor the State of Hawaii was harmed in its competitive position in any business, whatever the ultimate effect of the overcharges for pipe or gasoline.

Whether competition in some unidentified business or industry was ultimately injured by the overcharges incurred by the governmental entity was never considered by the Supreme Court. As Justice Holmes' remarks in *Chattanooga* graphically illustrate, the question of whether the City of Atlanta was injured in the business of furnishing water was unimportant because the amount of the overcharge was the damage. Justice Marshall, in *Hawaii, supra* 405 U.S. at 262, n. 14 explicitly recognized this point:

> Where the injury to the State occurs in its capacity as a consumer in the marketplace, through a "payment of money wrongfully induced," *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1906), damages are established by the amount of the overcharge. Under §4, courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.* [1968 TRADE CASES ¶72,490], 392 U.S. 481, 489 (1968).

Clearly, if a government consumer that is not in competition (except perhaps for investment capital) may sue for antitrust damages for overcharges it may have "passed-on" to its citizens, then certainly those citizens themselves, who can pass on none of the overcharge, should also have standing to sue. Defendants request this Court to deny individuals the same rights that the Supreme Court has at least twice recognized on behalf of governmental entities. To rule as defendants request is to discriminate against individuals in favor of government without any basis whatsoever. Indeed, as already mentioned above, in denying the *parens patriae* count in Hawaii, Justice Marshall observed that private citizens did not need the government's help to prosecute their claims. The citizens could resort to class action procedure in order to accomplish a recovery without government assistance. *Hawaii, supra*, 405 U.S. at 266.

If this Court nevertheless insists upon commercial interests being present, plaintiff submits that sales and purchases of women's clothing are commercial transactions. Such sales are transactions in goods within the scope of the Division on Sales of the California Commercial Code:

> Unless the context otherwise requires, this division applies to transactions in goods. . . .

Cal. Comm. Code, §2102. See *English* v. *Ralph Williams Ford*, 17 Cal. App. 3d 1038, 1046-1047, 95 Cal. Rptr. 501 (1971). Consequently, all the rights and remedies afforded by the Sales Division would be attendant to such transactions between defendants and plaintiff and class members. The defendants, for example, have a right pursuant to Cal. Comm. Code, §2702(2) as unpaid sellers under certain circumstances to reclaim goods sold to any buyer on credit while such buyer is insolvent. See *English, supra*, 17 Cal. App. 3d at 1047; *In re Bel Air Carpets, Inc.*, 452 F.2d 1210, 1211-1212 (9th Cir. 1971). In fact, unless defendants are engaging in purely coercive tactics, they are interested enough in the unpaid accounts of credit purchasers to bring counterclaims in this litigation. Defendants are seeking to enforce their rights in these credit transactions. Certainly plaintiff's property is also a commercial interest which has been directly affected by a violation of the antitrust laws and should also receive judicial sanction through the treble damage provision of section 4 of the Clayton Act.

However, as section III, *infra* demonstrates, not all consumers must have commercial interests to have standing to sue for antitrust damages despite the language of *Hawaii* upon which defendants rely. At least one circuit court in dictum has so stated.

In *Cleary* v. *Chalk*, 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974), a farepaying passenger of a transit company brought an action on behalf of himself and others for violation of section 10 of the Clayton Act. The district court dismissed and the Circuit Court affirmed,

finding that the complained of transactions did not come within the scope of section 10.

Although the Court did not decide the question of antitrust standing, it did note:

> Appellees also mount a strenuous attack on appellant's standing to sue. The jurisdictional predicate of this suit is §4 of the Clayton Act, which authorizes an action for treble damages by a "person . . . injured in his business or property by reason of [conduct] forbidden in the antitrust laws." See note 3, *supra*. This language makes evident three basic requirements which appellant had to satisfy in order to achieve standing to maintain the action.
>
> The first was sufficient allegation of injury to "business or property", and those words "refer to commercial interests or enterprises". Hawaii v. Standard Oil Co., 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed. 2d 184 (1972). One who in a business transaction purchases an article is "injured in [his] property" when he is "led to pay more than the worth of the" article, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396, 27 S.Ct. 65, 66, 51 L.Ed. 241 (1906); "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id. Accord*, Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489-490, 88 S.Ct. 2224, 20 L.Ed. 2d 1231 (1968). We have no doubt that a consumer of service who is illegally overcharged sustains a property injury no less than a consumer of goods. See Hawaii v. Standard Oil Co., *supra*, 405 U.S. at 262-264, 92 S.Ct. 885, Thomsen v. Cayser, 243 U.S. 66, 88, 37 S.Ct. 353, 61 L.Ed.

Cleary, supra, 488 F.2d at 1319, n. 17.

Finally, although the issue was not presented to the Supreme Court and therefore the decision is not precedent for this Court, plaintiff submits that the recent case of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) is instructive. The plaintiff in that case was a purchaser of legal services for the

purpose of a title examination precedent to obtaining title insurance and financing for the purchase of a home. Mr. Goldfarb had no injury to commercial property, nor apparently was his competitive position in any business damaged. Although standing to sue is not jurisdictional, but rather goes to the merits [see *General Inv. Co.* v. *New York Central R.R.*, 271 U.S. 228, 230 (1926)], it seems inconceivable that the Supreme Court would not at least in passing mention that the issue was present, even if not raised by the parties. If the antitrust standing of consumers of legal services for non-commercial reasons is permitted, then certainly consumers of women's clothing should not be denied the same remedy.

III

Hawaii And *Air Pollution* Do Not Hold That All Consumers Must Have Commercial Interests To Have Standing To Sue Under Section 4 Of The Clayton Act

In their efforts to further complicate the law of antitrust standing which has sprung from a rather straight-forward statute, defendants have failed to heed the admonition of Mr. Justice Jackson regarding Supreme Court language taken out of context:

> It is timely again to remind counsel that words of our opinions are to be read in the light of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.

Armour & Co. v. *Wantock*, 323 U.S. 126, 132-133 (1944).

The general expression of law which defendants contend precludes standing by plaintiffs in these cases is part of a ruling denying a state standing to sue under section 4 for injuries to its "general economy". *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972). The Court in *Hawaii* recognized that a state could sue under section 4 in its proprietary capacity for treble

damages. *Id.* at 262. Thus, a state may sue as a consumer in the marketplace for overcharges resulting from antitrust violations. *Id.*

Justice Marshall then proceeded to distinguish between a state's proprietary interests and its general economy for purposes of section 4 of the Clayton Act as follows:

> Like the lower courts which have considered the meaning of the words "business or property", we conclude that they refer to commercial interests or enterprises. See, e.g., Roseland v. Phister Mfg. Co. (1940) — 1943 TRADE CASES ¶56,187), 125 F.2d 417 (CA-71942); Hamman v. United States (1967 TRADE CASES ¶72,172), 267 F.Supp. 420 (Mont. 1967), appeal dismissed, 399 F.2d 673 (CA-9 1968); *Broadcasters, Inc.* v. *Morristown Broadcasting Corp.* (1960 TRADE CASES ¶69,847), 185 F.Supp. 641 (NJ 1960). When the State seeks damages for injuries to its commercial interests, it may sue under §4. But where, as here, the State seeks damages for other injuries, it is not properly within the Clayton Act.

Hawaii, supra, 405 U.S. at 264. Clearly, the Court was not holding that all plaintiffs must have commercial interests or enterprises in order to sue for damages under section 4. Rather, because the phrase "business or property" is a broad one and could be construed to apply without limitation to all aspects of a state's economy,[6] the Court in Hawaii decided that when a state is a plaintiff, it may sue under the antitrust laws only for injuries to its commercial interests.

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[6] Indeed, the District Court in *Hawaii* v. *Standard Oil Co.* had held:

> If the economy of a state can be injured, then that economy is finite and can fall within a definition of the word "property", even though it does not fall within the normal, simple definition of "business and property" under Section 4 of the Clayton Act. 301 F.Supp. 982, 988 (D. Haw. 1969).

The need to limit a state's standing to sue was perhaps better explained by the Ninth Circuit in *Hawaii* v. *Standard Oil Co.*, 431 F.2d 1282, 1285 (1970):

> An injury to the general economy of the state is not an injury to the business or property of the state or its people. A state can, in its proprietary capacity, engage in business. For injury suffered in these respects a state can recover under §4 . . . But the terms "business or property" are to be construed in their ordinary sense; they do not encompass all pecuniary injury, let alone all manner of damage felt by a community. * * * *Unless the concepts of business or property are expanded well beyond traditional usage, the general economy of a region cannot be regarded as property in possession of the residents individually or publicly.* [Emphasis supplied].

The history of the *Hawaii* case demonstrates that the issue concerning the courts was whether the general economy of the State of Hawaii could be regarded as property.[7] The Ninth Circuit made clear that the general economy of a state cannot be regarded as property. The Supreme Court reiterated this position by defining just what interests of a state did fall within the scope of the phrase "business or property". Only the "commercial interests or enterprises" of a state can be the basis for a treble damage suit under section 4.

Justice Marshall's words must be read in the light of the case under discussion. To generalize his statements into a holding that *any* plaintiff without *any* commerical interests or ventures can never have standing to sue under section 4 is not warranted by the holding of the case or by the very terms of the statute. In *Hawaii* the Supreme Court never questioned a state's standing to sue in its proprietary capacity. See 405 U.S. at 262. In other words a state may sue for those injuries suffered in its capacity as a consumer of goods and services.

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[7] "[T]he critical question is whether the injury asserted by Hawaii in its *parens patriae* count is an injury to its 'business or property'". 405 U.S. at 261.

Quite clearly, however, a state purchases goods and services only to perform the so-called "business" of government. A state cannot consume goods and services for any other purpose, unlike private individuals who can purchase goods and services either for commercial reasons or for purely personal use.

Defendants would have this Court conclude that because a state can only consume goods and services for the function of running the business of government, that therefore all private treble damage plaintiffs can only sue for injuries incurred when they consume goods and services for commercial use. See Defendants' Memorandum pp. 14-15. The argument is logically faulty. Furthermore, the opinion in *Hawaii* contravenes any such conclusion. Justice Marshall suggests:

> Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldly; it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens.

405 U.S. at 266.

Nowhere in the *Hawaii* opinion does the Court suggest that only commercial consumers have standing to sue under Section 4. The language which defendants cite must be read in the context of the holding. When testing the standing of a state to sue for damages under the antitrust laws, "business or property" is confined to a state's commercial interests which arise when the state operates in the marketplace in its proprietary capacity.

The subsequent holding of the Ninth Circuit in the case of *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th

Cir.), *cert. denied* 414 U.S. 1045 (1973) follows the reasoning of the *Hawaii* case. The Court held that:

> [S]ince neither the government's individual claims, nor their class claims, nor their *parens patriae* claims allege any injury to commercial ventures or enterprises, the governmental entities cannot seek recovery under section 4 of the Clayton Act.

481 F.2d at 126.

In *Air Pollution* the government plaintiffs sought damages not in any proprietary capacity, but rather for injuries to that which the Court in *Hawaii* called the "general economy". The conspiracy charged was one which allegedly eliminated competition among automobile manufacturers in the research, development, manufacture, installation and patenting of automotive air pollution devices. The governmental entities claimed losses resulting from the diminution in value of, and expenditures in connection with, government property and interests. 481 F.2d at 125. However, as the defendants' appellate brief in the Ninth Circuit pointed out:

> The antitrust violations charged in the complaints relate solely to the business of developing and installing emission controls in motor vehicles. Plaintiffs do not and cannot allege that they have had or desired to have business transactions in this market, whether as buyers, sellers, competitors or employees and that, as such, they have been injured by the alleged violations.

Brief for the Appellants, In *re Multidistrict Vehicle Air Pollution*, United States Court of Appeals, Ninth Circuit, No. 71-1241, page 9.

Unfortunately for plaintiffs, their argument was precisely the one rejected in *Hawaii*. After quoting the language of Mr. Justice Holmes in *Chattanooga Foundry & Pipe Works* v. *Atlanta, supra*, their appellate brief argued:

> If Atlanta was injured in its "business of furnishing water", California, Philadelphia, New York City, and

> the other governmental entites that have made expenditures to combat the effects of motor vehicle air pollution caused by defendants' antitrust violation are likewise injured in their business, i.e., the business of protecting, preserving, and caring for the "safety, health, comfort, and general welfare of the inhabitants of the [State or] city and visitors thereto".

Brief for the Appellees, *In re Multidistrict Vehicle Air Pollution*, United States Court of Appeals, Ninth Circuit, No. 71-1241, pages 18-19. The damages which the government plaintiffs in *Air Pollution* claimed were not to the "businesses" of the states as defined in *Hawaii*, specifically commercial interests. Consequently, the Ninth Circuit held that these plaintiffs had no standing to sue for the alleged antitrust violations. *Air Pollution* does not hold that all noncommercial consumers have no standing to sue under section 4 of the Clayton Act.

Interestingly, two of the three cases which the Court in *Hawaii, supra*, 405 U.S. at 264 cites for the general statement that "business or property" refers to commercial interests or enterprises, do not even discuss the meaning of "property" which plaintiff here relies upon for standing in this case.

In *Roseland* v. *Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942), an exclusive sales agent brought an antitrust action against his employer and others, alleging that they combined and conspired to suppress competition in fire prevention equipment, thereby depriving plaintiff of an opportunity to bid and make sales in certain territories. The court held that plaintiff had a "business" which had been damaged. Defendants' argument that the "business" was theirs rather than plaintiff's was rejected.

> [T]he selling of merchandise by [plaintiff] under exclusive sales contracts constitutes his business. We may not by what seems to us a strained and unjustified limitation bar plaintiff from the statutory remedy. "*Congress evidently foresaw the wholesome effect of pecuniary*

> *responsibility for injuries resulting from such forbidden combinations and the courts should not devitalize the remedy by strained interpretations calculated to* encourage disregard of the law". Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. [Emphasis supplied]

Roseland, supra, 125 F.2d at 420. This case can hardly be authority for the proposition that section 4 of the Clayton Act should be read more narrowly.

Neither does *Broadcasters, Inc.* v. *Morristown Broadcasting Corp.*, 185 F.Supp. 641 (D.N.J. 1960) shed any light on the question of the meaning of "property" for purposes of section 4. In *Broadcasters* plaintiffs who had made an application to the FCC for permission to construct a radio station were held to be not injured in their business or property:

> The plaintiffs were not engaged in a commercial venture or enterprise at the time this suit was brought; they entertained nothing more than an expectation that they would be so engaged if the license were granted.

Broadcasters, supra, 185 F.Supp. at 644. Plaintiff in the instant case has more than a mere expectation. Consumer transactions have transpired involving tangible goods.

The third case which the Court in *Hawaii* cites is most relative to the question at issue in this case. In *Hamman* v. *United States*, 267 F.Supp. 420 (D.Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968), plaintiff survivors alleged that an illegal conspiracy among defendant contractors doing business as joint venturers in the construction of a dam prevented safe construction companies from bidding for the job. This, plaintiffs contended, resulted in a lack of job safety which was the cause of the decedent workmen's deaths, thereby injuring plaintiffs with loss of consortium, a property right in Montana. The court held, *inter alia*, that:

> Nor is the allegation of an injury to "property" sufficient to permit recovery under the Sherman and Clayton Acts. "The term 'business or property' is used in the or-

> dinary sense and denotes a commercial venture or enterprise". Broadcasters, Inc. v. Morristown Broadcasting Corp., N.D. 1960, 185 F.Supp. 641, 644, and cases there cited. Although plaintiff correctly cites Waldron v. British Petroleum Co., supra, for the principle that "property" is a much broader term than "business", yet that case also holds that it must be a type of property that is legally protected. While it may be true that the right of consortium is a "property" right in Montana, in no case has it been held that the antitrust laws were intended to protect a property right of this nature.

Hamman, supra, 267 F.Supp at 432. The Hamman case is far different from the case *sub judice*. The antitrust laws are designed to promote price competition. As Mr. Justice Black said in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4 (1958):

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrainted interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress. . . .

Plaintiff consumers of women's clothing are no less entitled to the benefits of competition than commercial consumers. Indeed, as the following discussion of legislative history of the Sherman Act indicates, end consumers such as plaintiff in this case typically bear the brunt of any restraint on competition. In a sense, the private consumers of the United States have become a "deep pocket" for American businesses engaging in anticompetitive conduct at all levels of industry. To preclude them from treble damage actions is entirely contrary to the protective purpose of the Sherman Act.

IV

Consumer Protection Is One Of The Purposes Of The Sherman Act And Clayton Act Antitrust Legislation

The lack of legislative discussion regarding the phrase "business or property" implies that Congress intended this disjunctive expression to mean exactly what it says. Nowhere in the legislative history of the Sherman or Clayton Acts is there any suggestion that the word "property" ought to be limited to property utilized in a business. Neither does the grammatical structure of the phrase "business or property" permit any such interpretation. The linguistic form created by the use of the word "or" has always articulated a choice between that preceding and that following the conjunction. Accordingly the phrase "business or property" means either one or the other.

Furthermore, nowhere in the Congressional debates is there any indication that the persons whose "property" is to be protected by the antitrust laws should not include consumers. One of the first criticisms of Senator Sherman's bill when first introduced was its apparent inability to protect adequately the overcharged consumer. In commenting upon section 2 of the original bill which afforded a cause of action to "any person or corporation injured or damnified",[8] Senator George said:

> This right of action against the persons in the combination is given to the party damnified. Who is this party in-

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[8] Section 2 of the bill originally introduced by Senator Sherman on December 4, 1889 as S.1, 51st Cong., 1st Sess. provided as follows:

> That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination may sue for and recover, in any court of the United States of competent jurisdiction of any Person or corporation a party to a combination described in the first section of this act, the full consideration or sum paid by him for any goods, wares and merchandise included in or advanced in price by said combination.

21 *Cong. Rec.* 1765 (1890).

jured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured."

This is the express provision of the bill, as I think is clear from the last clause of the first section. But even if it were not the express language of the bill, it so results as a logical necessity. An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advance would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so of all of them, including the last, who sells directly to the consumer. The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.

Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination. It is manifest that in nearly every instance the damage by the advanced price of each article affected by these combinations would be — though in the aggregate large, indeed — so small as not to justify the expense and trouble of a suit in a distant court. The consumer claims a loss of say, $25, on a particular article, as sugar, affected by the combination. If he succeeds he gets double damages; that is, $50. He may live in Missouri, or Texas, or Kansas; he must go to New York, or Boston or Chicago, or some distant city to bring his suit. He is poor, a farmer, or mechanic, or laborer. He undertakes to get damages from a powerful and rich corporation, or combination of corporations and persons. He must employ lawyers; he must hunt up and

> interview witnesses, many of them unwilling to communicate what they know and some interested in misleading him. He must summon them; pay their expenses. He must attend the court. If he is ready for trial the cause will be probably continued. The result will be in nearly every case that, crushed by the expense, wearied by the delays, he will abandon the suit in despair. [Emphasis supplied]
>
> I do not hesitate to say that few, if any, of such suits will ever be instituted, and not one will ever be successful.

21 *Cong. Rec.* 1767-1768 (1890).

Senator Sherman acknowledged the difficulties of bringing suit against large and powerful combinations, and expressed his doubt that an adequate remedy was provided for the "single individual whose bread has been advanced in price and whose small expenditures have been somewhat increased". 21 *Cong. Rec.* 2569 (1890). However, the author of the original bill also remarked as follows about the private right of action in section 2:

> I think myself the rule of damages is too small. It provides double the damages and reasonable attorneys' fees.[9] Very few actions will probably be brought, but the cases that will be brought will be by men of spirit, who will contest against these combinations.

21 *Cong. Rec.* 2569 (1890). What was clearly contemplated by

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[9] The original bill had been amended to provide:

> Sec. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee.

See, 21 *Cong. Rec.* 2155 (1980).

Senator Sherman was that the incentive to ordinary citizens to prosecute and obtain a civil remedy for damages was not sufficient.

The mere recognition of the difficulties inherent in private litigation by an individual consumer against a powerful corporation cannot be construed, as defendants suggest, as an intention to preclude the individual consumer from any remedy whatsoever. Senator Coke was also concerned that the consumer would be left without an adequate remedy. Defendants have cited his remarks in part at page 25 of their Memorandum. A more complete quotation places those remarks in the proper perspective:

> *How would a citizen who has been plundered in his family consumption of sugar by the sugar trust*, or in his consumption of cotton-bagging under the trust governing that indispensable article, or in his consumption of iron or steel by the iron and steel trust *recover his damages under that clause*? It is simply an impossible remedy offered him. The bill is as vague as the world. [Emphasis supplied]
>
> I do not believe that a recovery can be had under it. It is a wasp without a sting; it is a law without a clause for its enforcement. If the party damnified, as has been said heretofore in this debate, were a great corporation, a wealthy association, it could employ lawyers and perhaps be able to show some direct damage, *but how could the consumers of the articles produced by these trusts, the great mass of our people — the individuals — go about showing the damages they had suffered*? [Emphasis supplied].
>
> How would they establish the damage which they had sustianed so as to get a judgment under this bill? I do not believe they could do it. I do not believe it is possible to do it. I think the constituents of all of us, the consumers of products which are raised and manufactured in this country, would be absolutely without a remedy under the bill of the Senator from Ohio.

21 *Cong. Rec.* 2615 (1890). Clearly the discussion centered around the *adequacy* of the remedy afforded consumers and not the *existence* of such remedy which was expressly given to any person injured.

The bill was substantially amended by the Judiciary Committee, at which time the phrase "business or property" was inserted into Section 7, the new civil remedy provision. The ensuing debate never focused on this phrase. Indeed, much of the debate concerned the amount in controversy as a jurisdictional limit, and whether State courts ought to have concurrent jurisdiction over antitrust suits. Senator Reagan expressed his concern as follows:

> The Senator from Vermont suggests that the bill is in the line which I have in view, of extending the law so as to put it within the reach of everybody by waiving the $2,000 limit, which fixes the jurisdiction of the circuit courts. The Senator certainly is right in that, and I feel gratified that the Committee on the Judiciary have put the clause into the section providing that these suits may be there prosecuted without respect to the amount in controversy.
>
> That, however — and I call the attention of the Senator from Vermont to it — is not the point that I presented as a reason for the amendment which I offered. The difficulty is in getting into the circuit court of the United States. Take any one of the great States of this country, especially those most sparsely settled; the litigants may in many cases be very far removed from the place of holding the circuit court and may be unable and would, if only a few hundred dollars were involved, be unable to employ counsel and go to the place where the court sits and bring suit and take witnesses and prosecute the claim. So, then, even with the provision as submitted by the Judiciary Committee and the words "without reference to the amount involved" inserted, still, the distance from the court and the expense of employing at-

torneys in that court would be involved, and *justice would be denied to the great mass of the people under the bill as it is presented.* [Emphasis supplied]

21 *Cong. Rec.* 3149 (1890). Mr. Edmunds, the Senator from Vermont and a member of the Committee on the Judiciary, replied:

> I repeat that this section was intended by the Committee on the Judiciary to allow anybody who wished, to sue in a court of the United States without regard to the $2,000 limitation, leaving to any man the original right to sue anybody that offended him in the courts of his own State and in the courts of his own county.

21 *Cong. Rec.* 3149 (1890).

Senator George was also concerned about the small claimant and offered as an amendment a kind of precursor to class action suits which would permit such individuals to unite in the same suit against the large defendants. In support of his amendment he argued:

> It is very well to talk about the symmetry of the work of the Judiciary Committee, but when you pass a bill by which you throw the poor unlettered and unskilled American farmer and American mechanic and American laborer, who are the great sufferers by these trusts and combinations, unaided, single-handed, against these large corporations, you must simply pass a bill that will amount to nothing, and *I predict — and I put it on the record now as my deliberate judgment — that not one suit will ever be brought under this seventh section by any person who is simply damaged in his character as consumer. I repeat it. I do not propose silently to sit here and be a silent partner, an assenting partner, to the enactment of what I know to be, so far as a remedy to the real parties injured by these trusts is concerned, a sham, a snare, and a delusion.* [Emphasis supplied]

* * *

> If some great manufacturer has been injured by an advance in the price of his raw material he can sue, but the poor man, the consumer, the laborer, the farmer, the mechanics, the country merchant, all that large class of American citizens who constitute 90 per cent of our population and who are the real sufferers will have no opportunity of redress, and the bill, so far as they are concerned, will be a snare and a mere delusion.

21 *Cong. Rec.* 3150 (1890). Evidently, Congress was satisfied with the language of section 7 of the bill and rejected Senator George's proffered amendment. Rather than rejecting the intent that the Sherman Act afford a private civil remedy to consumers, the Congress believed that such a remedy existed within the language of the bill as it then stood. The following colloquy between Senator Edmunds and Senator Morgan reflects that understanding:

> Mr. EDMUNDS. If my friend from Alabama will allow me, I wish to add that the framework of this bill provides, first, for a declaration of the illegality of these things; it provides, second, for the criminal punishment of the parties engaged in that illegal combination; it provides, third, for an institution of a suit on the part of the United States to repress it as you suppress a nuisance, althought it is liable to indictment; it provides, fourth, that, on the part of the United States defending all small people, any part of the property which is the subject of this combination that is moved from State to State (that is as far as we can go, as everybody knows) shall be an illegal movement and subject to confiscation. Then we say that anybody, without respect to the amount in controversy, may bring suit in the circuit court.
>
> Mr. MORGAN. I should have been perfectly satisfied with this bill, or the first three propositions of it, as a bill that would cover the evil, but *we have gone further and given a personal remedy, to whoever may be injured in his business or property by the unlawful act defined and denounced in the statute.* [Emphasis supplied]

21 *Cong. Rec.* 3149 (1890).

Section 7 of the Sherman Act was thus enacted with the intent that anyone, including consumers, would be afforded a civil remedy for damages for violations of the Act without regard to the amount in controversy. Subsequent reenactment of this section as section 4 of the Clayton Act did not alter this intent. As Congressman Floyd of the House Judiciary Committee said regarding section 4 (at that time number Section 5) in the House debates:

> Section 5 is simply a reenactment of the provisions of Section 7 of the Sherman law, so as to make it applicable to the provisions of this bill.

51 Cong. Rec. 9164 (1914).

In describing what the antitrust legislators sought to accomplish, the Supreme Court in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 498 (1940) confirmed the intent of Congress to protect all consumers:

> In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of "trusts" and "combinations" at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by a combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

Defendants by this motion are attempting to erect further barriers for consumer antitrust plaintiffs. Such an attempt justifies the fears raised by the senators in 1890.

V

Conclusion

Although plaintiff does not dispute defendants' motion to dismiss the claim for injunctive relief,[10] plaintiff strenuously contests standing to sue for damages. The motion to dismiss is constructed upon statements of law made in a case deciding a different issue than the one presented to this Court. The *Hawaii* case cannot be construed to have overruled the decision in *Chattanooga*. An assumption of overruling by implication is not favored. See *Brown* v. *United States*, 54 F.Supp. 663 (S.D. Cal.) 1941). As the Court in *Hawaii* itself indicated, *Chattanooga* is still good law.

Defendants have disregarded the maxim that:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. *Virginia*, 6 Wheat. 264, 399-400 (1821).

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[10] The recent decision in *In re Multidistrict Vehicle Air Pollution*, 1976 Trade Cas. ¶60,945 (9th Cir. 1976) governs this issue.

For the foregoing reasons, plaintiff submits that the language in *Chattanooga* is controlling in this case and that defendants' motion to dismiss for lack of standing to sue for damages should be denied.

DATED: August 6, 1976.

Respectfully submitted,

LAW OFFICES OF JERROLD N. OFFSTEIN
JERROLD N. OFFSTEIN
JOHN A. KITHAS
CHARLES LAMONT

By Charles Lamont
CHARLES LAMONT
ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-76-867 SW

DONNA JEAN WEINBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

NO. C-76-869 SW

ELEANOR EISENBERG, *et al.*,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

NO. C-76-1110 SW

MARILYN MOITIE,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

NO. C-76-1363 SW

SANDRA G. MUSSER,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

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NO. C-76-1429 SW

JUNE MORGAN,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., *et al.*,

Defendants.

MEMORANDUM ORDER

(Filed January 11, 1977)

The defendants in these actions are Federated Department Stores, Inc., d/b/a I. Magnin & Co., and Saks & Company, d/b/a Saks Fifth Avenue. They are engaged in the business of selling merchandise, including women's clothing, to the general public at retail prices through retail stores located in Northern California and elsewhere. The plaintiffs in all of these cases are individual members of the general public who allege that they purchased women's clothing at retail from one or both of the defendants. The plaintiffs allege representation of overlapping classes of retail purchasers.[1] These actions parallel an indictment and civil com-

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[1] The alleged classes are defined in the various complaints as follows:

Weinberg — All persons who purchased women's clothing at retail prices from defendants in Northern California during the period from as early as 1963 until at least April, 1974;

Eisenberg — All individuals, corporations or other entities who have made retail purchases of women's clothing from one or both of the defendants in Northern California at any time from 1963 to the filing of the complaint;

Moitie — All persons residing in Santa Clara and San Mateo counties who, from 1963 to the present, made retail purchases of women's clothing (i) from I. Magnin on a charge basis, (ii) from I. Magnin on a check or cash basis, (iii) from Bullock's Northern California (a separate Federated division from I. Magnin) on a charge basis, (iv) from Bullock's Northern California

plaint filed in this court by the United States on April 28, 1976. (*See United States* v. *Federated Department Stores, Inc., et al.*, Civil Number C-76-858-RHS, and CR-76-236-SAW.) The government antitrust action charged that I. Magnin and Saks had agreed to fix the retail prices of women's clothing sold by them to the general public in Northern California during the period from early 1963 until April 1974. The civil complaints in this action allege that the plaintiffs were the victims of prices artificially maintained at high levels in violation of the antitrust laws of the United States.

Section 4 of the Clayton Act, 15 U.S.C. §15, which would provide plaintiffs with their remedy in damages, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

To maintain this action, plaintiffs must, under the language of section 4, have suffered an injury to their *business or property* interest. The parties in this action have briefed defendants' motion to dismiss for lack of standing, focusing on the issue of the nature of plaintiffs' *business or property* interest which has been allegedly injured.

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on a check or cash basis, (v) from Saks on a charge basis, and (vi) from Saks on a check or cash basis;

Musser — All persons in Northern California who purchased women's clothing, on charge accounts, from one or both defendants from as early as 1963 until at least April, 1974;

Morgan — All charge customers who bought women's clothing with an aggregate sales value of $250 or more since January 1963 from, and whose names appeared as of March 31, 1974 on the charge account list kept by (i) I. Magnin, (ii) Bullock's Northern California and (iii) Saks.

Legislative History

The antitrust act which was passed in 1890 was meant to protect competition and to thwart the takeover of small businesses by the growing number of ruthless financiers who, at that time, were gaining control over the economy of the country. The Sherman Act of 1890 originally provided relief[2] for "any person . . . injured or damnified." *See* Cong. Rec. 1765 (1890). This language, changed in the version reported out of committee by the Judiciary Committee of the Senate, provided treble damages for injuries to a person's "business or property", and that version was enacted into law. *See* 21 Cong. Rec. 2901 (1890); Sherman Act of 1890, ch. 647, § 7, 26 Stat. 209. By adding the requirement that the injury must be to a person's *business or property* interest, Congress narrowed the field of those who could sue to recover for an injury caused by antitrust violations. In other words, a plaintiff must show more than a mere injury. As Senator Morgan stated,

> This bill ought not to be a breeder of lawsuits. If there is any one duty we have got higher than another in respect of the general judiciary of the United States, it is to suppress litigation and have justice done without litigation as far as we can . . . . [21 Cong. Rec. 3149 (1890).]

Only by drawing a line at a *business or property* interest could the proliferation of lawsuits feared by the Congress be

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[2] There is much confusion in the legislative history as to when the language relating to treble damages was added. The Senators in office at the time were themselves confused. Senator George, in an attempt to set the record straight, discussed several versions of the bill, quoting from the record, to show his colleagues which versions and which subtle changes, were introduced at what stages. *See* 21 Cong. Rec. 2597-2600 (1890). The original bill (Sherman's, introduced August 14, 1888) provided for full recovery, as did the second (of September 11, 1888), the third (of January 25, 1889), and the fourth, a composite of the second and third (introduced in December, 1889). The Finance Committee version, of January 14, 1890, provided for double recovery. The version reported out by the Judiciary Committee includes the treble damage provision. 21 Cong. Rec. 2901. The latter is the version approved by the Senate. 21 Cong. Rec. 3145 (1890).

prevented. And the meaning of that phrase is the sole issue presented in this motion to dismiss. If the plaintiffs were injured in their *business or property* they have standing to sue for treble damages. If not, they don't.[3]

A review of the Congressional Record permits some illumination on congressional intent, but much room for disagreement persists. However, numerous references do indicate that in 1890 Congress was well aware of the fact that the new law would afford no remedy for the average consumer. *See* 21 Cong. Rec. 2569 (1890) (Sen. Sherman); *Id.* at 2610 (Sen. Morgan); *Id.* at 2615 (Sen. Coke); *Id.* at 3150 (Sen. George).

Senator Sherman, the author of the original bill, stated to the Senate that,

> In the case of a single individual whose bread has been advanced in price or whose small expenditures have been somewhat increased, there is no remedy for him. The remedy is only for those who are largely enough interested to sue . . . . [21 Cong. Rec. 2569 (1890).]

The Clayton Act additions, in 1914, strengthened the remedy for the small businessmen for whom litigation was difficult under the original act. Clayton provided not only the treble damage remedy of the Sherman Act, but permitted the person injured to seek injunctive relief and, as well, to introduce judgments obtained by the government as conclusive evidence of antitrust violations. *See* 51 Cong. Rec. 9270 (1914). In outlining the major portions of the Clayton Act to fellow members of the House of Representatives, Representative Webb of the House Judiciary Committee claimed that the purpose of the Clayton Act, specifically section 4 (then section 5), was to give

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[3] There is no question that the plaintiffs are the targets of the alleged price fixing activities of the department store defendants. *See In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198-99 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

> any person who may be injured in his business, by reason of anything forbidden in the antitrust laws, the right to . . . recover threefold the damages sustained . . . . [51 Cong. Rec. 9073 (1914) .]

More specifically, Representative Carlin asserted,

> We went further in our effort to help the individual. We said, "When you have been damaged *in your business* by a combination operating in restraint of trade we are going to put you no longer to the expense of gathering the testimony and of combatting the wealth of the world in order to recover your damages. [51 Cong. Rec. 9270 (1914) (emphasis added).]

That the *business or property* language was meant to encompass injuries to businesses rather than to individuals is also evident from the preoccupation of members of congress with providing remedies for the injured businessman. For example, Representative Taggart told the House,

> A great many suits have been brought against trusts by the United States and many trusts have been dissolved. Some few have been punished, but the *people whose business they destroyed* have been practically without remedy. When this bill becomes a law, the person who willfully destroys another person's business will do so at his peril. . . .
>
> The bill is *framed for the purpose of liberating business* and not for the purpose of injuring or destroying any business. Its great purpose is to *protect small business from big business*, ... [51 Cong. Rec. 9198 (1914) (emphasis added).]

And the Senate was equally preoccupied with the need to enlist the injured businessmen in the attack on antitrust violations. Senator Reed noted:

> It follows that the Argus eyes of thousands of businessmen now being injured will be upon the powerful concerns, and the thousand arms of the courts will be employed to prevent . . . evil practices. [51 Cong. Rec. 12939 (1914).]

Judicial Construction

The courts that have addressed the question directly have uniformly interpreted congressional intent as requiring a commercial nexus. The ninth circuit has adopted a measured approach.

> [C]ourts have impressed a standing doctrine so as to confine the availability of section 4 relief only to those individuals whose protection is the fundamental purpose of the antitrust laws. *Cf.* Barlow v. Collins, 397 U.S. 159 . . . (1970); Association of Data Processing v. Camp, 397 U.S. 150 . . . (1970); Mount Clemens Industries, Inc. v. Bell, 464 F.2d 339, 341-344 (9th Cir. 1972). Unfortunately, no "bright line" has yet emerged to divine this group, and courts have formulated varied definitions. [*In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), *reh. denied*, 414 U.S. 1148 (1974).]

The Vehicle Air Pollution court then criticized the lower court's expansive reading of section 4's coverage. The language of section 4, and the judicial constructions of standing thereunder had, the circuit asserted, keyed on the phrases *business or property* and *by reason of* as indicating twin requisites for standing.[4]

The first of these twin requisites for standing, the phrase *business or property*, is "a term definitively limited to interests in commercial ventures or enterprises." *Vehicle Air Pollution*, *supra*, 481 F.2d at 126. The state of California, suing for individual injury to itself, as a class representative and also in *parens patriae* was held to lack standing since none of its claims alleged any injury to commercial ventures or enterprises. *Id.* The contrasting claims of farmers whose crop yield was diminished because of the failure to develop adequate

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[4] In this action, the phrase *business or property* is the only one which is in issue. Plaintiff's injury, whatever interest it is, is within the target area of defendants' activities.

pollution control devices were sufficient to allege injury to a commercial interest. These farmers, however, were found to lack standing when the target area test was applied.

The Supreme Court has agreed. In *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), the state of Hawaii sued for an injury to itself as the purchaser of overpriced petroleum products (405 U.S. at 253), and also as both *parens patriae* for overcharges paid by citizens and as a class representative of all purchasers in Hawaii. The Supreme Court did not allow Hawaii to sue as *parens patriae*, since,

> A large and ultimately indeterminable part of the injury to the "general economy," as it is measured by economists, is no more than a reflection of injuries to the "business or property" of consumers, for which they may recover themselves under § 4. Even the most lengthy and expensive trial could not, in the final analysis, cope with the problems of double recovery inherent in allowing damages for harm both to the economic interests of individuals and for the quasi-sovereign interests of the State. (405 U.S. at 264.)

The Supreme Court permitted Hawaii to sue for the injury to itself, because it was injured in its proprietary interest. And,

> [l]ike the lower courts that have considered the meaning of the words "business or property," we conclude that they refer to commercial interests or enterprises. *See, e.g., Roseland* v. *Phister Mfg. Co.*, 125 F.2d 417 (CA7 1942); *Hamman* v. *United States*, 267 F. Supp. 420 (Mont. 1967), appeal dismissed, 399 F.2d 673 (CA9 1968); *Broadcasters, Inc.* v. *Morristown Broadcasting Corp.*, 185 F. Supp. 641 (NJ 1960). (405 U.S. at 264.)

In view of the foregoing, it is apparent that consumers not claiming injury to any business or commercial interest lack standing to maintain an antitrust action for their injuries. The phrase *business or property* cannot be read to encompass injuries to pure business interests and also to pure property interests, in the disjunctive. The phrase is a conjunctive reference to interests of a business nature.

The eighth circuit has adopted the same interpretation of the standing requirement inherent in the *business or property* term. The district court in Arkansas' eastern district, affirmed strongly by the eighth circuit,[5] accurately interpreted the *business or property* phrase of section 4 of the Clayton Act:

> plaintiffs . . . must also show that they have been injured in their "business or property" as that phrase is used in Section 4 of the Clayton Act. The Supreme Court of the United States has emphasized that in determining who may sue under the antitrust laws, the central inquiry is one of *competitive injury*. Perkins v. Standard Oil Co., 395 U.S. 642, 648-49, . . . (1969). Since the purpose of the antitrust laws is the "prevention of restraints to free competition in business and commercial transactions," Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 . . . (1940), it follows that only those persons injured in their competitive positions in a business in which they are engaged should be permitted standing to sue under the Clayton Act. GAF Corp. v. Circle Floor Co., 463 F.2d 752, 758 (2nd Cir. 1972), cert. dismissed, 413 U.S. 901, . . . (1973). [*Ragar* v. *T. J. Raney & Sons*, 388 F. Supp. 1184, 1187 (E.D. Ark.), *affirmed*, 521 F.2d 795 (8th Cir. 1975).]

The consumers in this action allege no injury to a business enterprise. They maintain, however, that an injury to their pocketbook is an injury to a sufficient commercial interest to satisfy the standing requirements in the ninth circuit. This court disagrees. A plaintiff must show an injury to a competitive interest in a business in which he or she is engaged to assert a cause of action under the antitrust laws, specifically section 4 of the Clayton Act.[6]

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[5] "Our evaluation of the record in light of the applicable case law, convinces us that the district court correctly ruled . . . . Accordingly, we affirm on the basis of the district court's soundly reasoned opinion, reported at 388 F. Supp. 1184 (E.D. Ark. 1975)." Ragar v. T. J. Raney & Sons, 521 F.2d 795, 796 (8th Cir.), *affirming* 388 F. Supp. 1184 (E.D. Ark. 1975).

[6] *Cf. Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906) (The city of Atlanta was injured in its pocket-

Unredressed Injury To Consumers

The adequacy of government remedies in these cases may be assailed. But the impotence of the individual consumer to recover under the existing antitrust laws should not prompt the courts to legislate a cause of action that does not exist in this circuit. That is for Congress to do.

Largely because of the lack of protection afforded the small businesses and the individual consumers by the 1890 and 1914 antitrust acts, the Antitrust Improvements Act of 1976 added civil process amendments to the laws together with a requirement of premerger notification and a *parens patriae* cause of action for states whose citizen consumers are injured in the future. 45 U.S.L.W. 139 (October 19, 1976). The *parens patriae* portion of this Act was designed to strengthen the ability of state attorneys general to attack antitrust violations directed at individual consumers, the

> honest businessmen and hardworking consumers [who] are the real beneficiaries of this bill. (Congressional Record, S 15410, September 8, 1976, remarks of Sen. Kennedy.)

The protection of individual consumers, nickeled and dimed to death by price fixing violations of department stores and other retail sales entities, is left to the government. If businesses, even small businesses, as distinguished from individual consumers, are injured in the price fixing activities of antitrust law violators, then they have a remedy under the Clayton and Sherman Acts. The new amendments will provide consumers with a remedy to be asserted by their state attorneys general. But section 4 of the Clayton Act of 1914, amending the Sherman Act of 1890, did not, as Congress understood those acts, arm the individual consumer with a cause of action.

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book, but the decision does not support a position contrary to that taken here. The city was in the business of "conducting a system of waterworks, and wishing to buy iron pipe, was led, by reason of the illegal arrangements between the members of the trust, to purchase the pipe . . . at a price much above what was reasonable . . . ." 203 U.S. at 395.

Even the 1976 amendments to the antitrust laws may be inadequate leaving consumers largely unprotected since maintenance of an action rests in the sole discretion of the state attorneys general. And with today's interest in consumer rights, the result that this opinion portends might seem at once atrocious and inequitable. It *is* inequitable to permit the violators, generally large corporations, to retain their ill-gotten gains. And it seems anomalous to permit the small businessman purchasing an automobile at an unlawfully inflated price to recover merely because he purchased the automobile for his business, but yet deny recovery to an individual consumer who purchased the same model automobile at the same inflated price because the consumer intends only to use the car for personal transportation. The costume designer in a theatre will be permitted to recover when a women's clothing item is purchased for a commercial theatrical production at an illegally inflated price whereas the individual consumer, purchasing the item for use at a costume party will be unable to recover.

But as inequitable as these, or other easily imagined factual situations may be, the Courts should not broaden the operative scope of those laws. That is the exclusive province of Congress under the Constitution of the United States.

Section 16 Remedies For Consumers

The consumers in this action have also claimed a right to relief under section 16 of the Clayton Act, 15 U.S.C. Sec. 26, which provides for injunctive relief:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . .

The government action in this case, for criminal and civil injunctive action against the defendants, provides an adequate protection against future harm from these defendants. The plaintiffs are not, under the circumstances here, faced with irreparable future injury which would entitle them to injunctive relief under section 16.

Conclusion

The plaintiffs in these related cases cannot recover treble damages under section 4 of the Clayton Act because they have failed to allege an injury to a sufficient commercial enterprise or business in which they are engaged. Neither are they entitled to injunctive relief under section 16 since they are not irreparably injured. Therefore,

IT IS HEREBY ORDERED that this matter, in its entirety, be and is dismissed for failure of the plaintiffs to allege sufficient standing to sue.

DATED: Jan. 11, 1977

Spencer Williams
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 76 1210 SW

FLOYD BROWN, individually, and on behalf of others similarly situated, *Plaintiff*,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE, *Defendants*.

No. C 76 1671 SW

DAVID M. KIMMEL, ROBERTA KIMMEL, DORIS WIESEL, FRANK WIESEL, and HELEN BAUM, *Plaintiffs*,

v.

BARRIE SOMMERFIELD, GORDON FRANKLIN, NORMAN V. WESCHLER, B. PAUL HEIDRICK, FEDERATED DEPARTMENT STORES, ETC., SAKS & COMPANY, ETC., UPTOWN RETAIL GUILD, INC., ANDREW GOODMAN, and BERGDORF GOODMAN, INC., *Defendants*.

ORDER

(Filed January 13, 1977)

On January 11, 1977, this court caused a memorandum order to be filed in five cases which had previously been related to these two cases. The same reasoning in that memorandum order controls the disposition of these two cases. *See* Memorandum Order, January 11, 1977, filed in civil numbers C 76 867 SW, C 76 869, C 76 1110, C 76 1363 SW, and C 76 1429, incorporated herein and made part hereof by reference). Therefore,

IT IS HEREBY ORDERED that these two related cases are dismissed in their entirety.

DATED: January 13, 1977

Spencer Williams
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 76 1210 SW

FLOYD BROWN, individually, and on behalf of others similarly situated,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S SOUTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE,

Defendant.

No. C 76 1671 SW

DAVID M. KIMMEL, ROBERTA KIMMEL, DORIS WIESEL, FRANK WIESEL, and HELEN BAUM,

Plaintiffs,

v.

BARRIE SOMMERFIELD, GORDON FRANKLIN, NORMAN V. WESCHLER, B. PAUL HEIDRICK, FEDERATED DEPARTMENT STORES, ETC., SAKS & COMPANY, ETC., UPTOWN RETAIL GUILD, INC., ANDREW GOODMAN, and BERGDORF GOODMAN, INC.,

Defendants.

JUDGMENT

(Filed January 13, 1977)

IT IS HEREBY ORDERED that judgment in the above two related cases be entered in favor of defendants and against plaintiffs.

DATED: January 13, 1977

/s/ SPENCER WILLIAMS
United States District Judge

MUNICIPAL COURT FOR THE PALO ALTO-MOUNTAINVIEW
JUDICIAL DISTRICT
COUNTY OF SANTA CLARA, STATE OF CALIFORNIA

No. 38929

FLOYD R. BROWN, individually and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & Co. and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

COMPLAINT FOR DAMAGES AND RESTITUTION

(Jury Demanded)

(Filed February 17, 1977)

Plaintiff, FLOYD R. BROWN, complains of Defendants FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & Co. and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX, and each of them, and alleges:

I

Class Action

(1) Plaintiff brings this action on his own behalf and pursuant to §392 of the California Code of Civil Procedure on behalf of all persons similarly situated. The classes which Plaintiff represents are composed of the following:

(a) All persons residing in Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties who, during the period from 1963 to present, have made retail purchases of women's clothing from I. MAGNIN on a charge basis.

PREVIOUS PAGE WAS BLANK

(b) All persons residing in Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties who, during the period from 1963 to present, have made retail purchases of women's clothing from I. MAGNIN on a check or cash basis.

(c) ALL PERSONS RESIDING IN LOS ANGELES, ORANGE, SAN BERNADINO, SAN DIEGO, SANTA BARBARA, AND VENTURA COUNTIES WHO, DURING THE PERIOD FROM 1963 TO PRESENT, HAVE MADE RETAIL PURCHASES OF WOMEN'S CLOTHING FROM BULLOCK'S on a charge basis.

(d) All persons residing in Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties who, during the period from 1963 to present, have made retail purchases of women's clothing from BULLOCK'S on a check or cash basis.

(e) All persons residing in Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties who, during the period from 1963 to present, have made retail purchases of women's clothing from SAKS FIFTH AVENUE on a charge basis.

(f) All persons residing in Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties who, during the period from 1963 to present, have made retail purchases of women's clothing from SAKS FIFTH AVENUE on a check or cash basis.

(2) The persons in the classes are so numerous that the joinder of all such persons is impracticable. The disposition of their claims in a class action is a benefit to the parties and to this Court. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that the same complained of conduct of Defendants, as hereinafter alleged, constitutes a basis of liability and injury to each member of the class hereinbefore described. The named Plaintiff is a purchaser of women's clothing from I. MAGNIN, BULLOCK'S, and SAKS FIFTH AVENUE. The claims of the Plaintiff are typical of those of the class and Plaintiff will fairly and adequately represent the interests of the class.

II

Plaintiff

(3) Plaintiff, FLOYD R. BROWN, is a resident of Laguna Niguel, Orange County, California.

III

Defendants

(4) FEDERATED DEPARTMENT STORES, INC. ("FEDERATED"), is hereby made a Defendant herein. FEDERATED is a corporation organized and existing under the laws of the State of Delaware. During the period of time covered by this complaint, FEDERATED has engaged in the retailing of women's clothing in California under the trade name of "I. MAGNIN & Co." The principal offices of I. MAGNIN & Co. are located in San Francisco, California. During the period of time covered by this complaint, FEDERATED has also commenced the retailing of women's clothing in California under the trade name "BULLOCK's," with principal offices located in Palo Alto, California.

(5) SAKS & COMPANY ("SAKS") is hereby made a Defendant herein. SAKS is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York City. SAKS is a wholly-owned subsidiary of GIMBEL BROTHERS, INC. During the period of time covered by this complaint, SAKS has been engaged in the retailing of women's clothing in California under the trade name "SAKS FIFTH AVEUNE."

IV

Does

(6) The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES I through XX, are unknown to Plaintiff at this time who, therefore, sues said Defendants by such fictitious names and will ask leave of court to amend this complaint to show

their true names and capacities when the same are ascertained. Plaintiff is informed and believes and, upon such information and belief, alleges that each of the aforementioned Defendants sued herein as a "DOE" is in some way legally liable for the events, happenings, or agreements hereinafter mentioned.

V

Agents And Co-Conspirators

(7) The Defendants, and each of them, at all times mentioned herein, were the agents of all other Defendants, and each of them, and were acting in the course and scope of said agency. Various other corporations and individuals not made Defendants in this complaint participated as co-conspirators with the Defendants named in the offenses charged herein and performed acts and made statements in furtherance thereof.

VI

Trade And Commerce

(8) The Defendants are among the largest retailers specializing in the sale of women's clothing in California. They have an image recognized in the women's clothing industry, and by the consumer, of selling fashionable women's clothing of quality fabrics and favored styling. In 1973 alone, they accounted for approximately $60 million in retail sales of women's clothing in California.

(9) In the retailing of women's clothing, the difference between the cost price of an item and its retail price is known as the "markup." Retailers maintain "markup lists" which show the retail price to be charged for items purchased at a given cost level. These markup lists are used by retailers to price items sold to the consumer.

VII

Offenses Charged

(10) Beginning at least as early as 1963, and continuing thereafter until April 1974, the Defendants and co-conspirators engaged in a continuing combination and conspiracy to wilfully defraud their retail customers by means of a price-fixing conspiracy.

(11) The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among Defendants and co-conspirators to raise, fix, maintain and stabilize prices charged by Defendants for the sale of women's clothing in California, including Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties.

(12) In formulating and effectuating the aforesaid combination and conspiracy, the Defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, the following:

(a) met and engaged in telephone conversations to discuss prospective markups and retail prices for the sale of women's clothing to customers of Defendants;

(b) exchanged markup charts used by Defendants in establishing the retail prices of women's clothing sold to customers of Defendants;

(c) established agreed-upon markups and retail prices for the sale of women's clothing to customers of Defendants; and

(d) adhered to agreed-upon markups and retail prices for the sale of women's clothing to customers of Defendants.

VIII

Effects

(13) The aforesaid combination and conspiracy has had the following effects, among others:

(a) prices of women's clothing have been raised, fixed, stabilized, and maintained at artificial noncompetitive levels; and

(b) customers of the Defendants have been deprived of free and open competition in the sale of women's clothing.

IX

Injury To Plaintiffs

(14) As a direct and proximate result of the unlawful acts and conduct of Defendants and co-conspirators hereinabove alleged, Plaintiff and members of the classes have suffered injury in that they have been forced to pay substantial overcharges on retail purchases of women's clothing.

X

Fraudulent Concealment

(15) At all times herein mentioned, the Defendants and the co-conspirators took measures to conceal from the Plaintiffs and the members of the Plaintiff class the violations hereinabove alleged. The meetings and the exchanges of markup charts hereinabove alleged took place in an atmosphere of the strictest secrecy, and were never revealed to anyone other than the representatives of the Defendants and the co-conspirators who participated therein. As a result of the Defendants' fraudulent concealment of their violations, the Plaintiff and the members of the Plaintiff classes were unaware of the existence of the claims alleged herein, and could not, by the exercise of reasonable diligence, have discovered the existence of such claims, until the year 1976.

XI

First Cause of Action

(Fraud And Deceit)

(16) Plaintiff incorporates and re-alleges Paragraphs I(1) through X(15) herein as though fully set forth.

(17) During the period of time from 1964 until at least 1974, in its retail stores, Defendants and their co-conspirators falsely and fraudulently represented that the prices charged therein for women's clothing were fair ones, dictated by free market competitive pressures and not pursuant to a price-fixing scheme as hereinbefore charged.

(18) These representations so made by Defendants and their co-conspirators were in fact false. The true facts are that these Defendants and their co-conspirators wilfully engaged in a fraudulent and wrongful course of conduct, as hereinbefore more fully alleged, intended to wrongfully extract large sums from their said retail customers, and this illegal scheme succeeded in that goal for in excess of ten years.

(19) When Defendants and their co-conspirators made these false allegations of fair play with regard to pricing, they knew them to be false; such statements were made by them with the intent to defraud and deceive Plaintiffs, and each of them, and to induce them to unjustly enrich Defendants pursuant to Defendants' said plot.

(20) Plaintiffs, at the times said representations were made, were ignorant of their falsity, but believed them to be true. In reliance thereon, Plaintiffs were induced to and did pay excessive sums to unjustly enrich said Defendants and their co-conspirators; had Plaintiffs known the true facts they would not have taken such action.

(21) Plaintiffs, and each of them, have been injured thereby as set forth below.

XII

Second Cause Of Action

(Unfair Business Practices)

(22) Plaintiffs incorporate and re-allege Paragraphs I(1) through X(15) herein as though fully set forth.

(23) Plaintiffs, and each of them, further allege that such a price-fixing conspiracy, and its attendant credit balance abuse, are a prohibited and unfair business practice, and said practices have proximately injured Plaintiffs, and each of them, as hereinbelow alleged.

XIII

Third Cause Of Action

(Civil Conspiracy)

(24) Plaintiffs incorporate and re-allege Paragraphs I(1) through X(15) herein as though fully set forth.

(25) The various acts and representations of Defendants and their co-conspirators, and each of them, as herein set forth, were made pursuant to and in furtherance of, the aforesaid combination and conspiracy between these Defendants and their co-conspirators. This activity was known to be illegal by Defendants. The purpose thereof was to sell to Plaintiffs, and each of them, said items of clothing at a price much greater than their value, with the intent of said Defendants to divide the profits derived therefrom among said Defendants.

(26) Plaintiffs, and each of them, did purchase said retail goods, whose prices were illegally fixed pursuant to said conspiracy, as set forth hereinbelow.

XIV

Fourth Cause Of Action

(Restitution Of Moneys Had And Received)

(27) Plaintiffs incorporate and re-allege Paragraphs I(1) through X(15) herein as though fully set forth.

(28) By reason of the effectiveness of the aforesaid conspiracy, Defendants, and each of them, have wrongfully retained moneys of Plaintiffs, and each of theirs, and interest thereon, in a sum not yet ascertained, but which Defendants are not entitled equitably to retain.

(29) By reason of the foregoing premises, and the wilful nature thereof, Defendants must be obliged not only to make restitution of such fraudulently converted sums, but to pay exemplary and punitive damages therefor.

WHEREFORE, Plaintiff prays that the Court adjudge, enjoin, and decree as follows:

(1) That this is a proper class action.

(2) That Defendants and co-conspirators have engaged in an unlawful conspiracy and combination to restrain trade and commerce in women's clothing in California, including Los Angeles, Orange, San Bernadino, San Diego, Santa Barbara, and Ventura Counties.

(3) That Plaintiff and members of the classes have been proximately injured by reason of one or more of the above alleged unlawful acts in an amount not less than $600 apiece for each violation of their property rights as alleged in the FIRST through their FOURTH CAUSE(S) OF ACTION

(4) That Plaintiff and members of the classes recover damages on each of their causes of action.

(5) That Plaintiff and members of the classes be awarded reasonable attorneys' fees and costs of litigation.

(6) That Plaintiff and members of the classes be awarded such other and further relief as the Court may deem just and

proper, including appropriate multiple damages, and exemplary and punitive damages, and all sums so awarded bear interest at 7% from the date of each injury.

DATED: February 17, 1977.

LAW OFFICES OF JERROLD
N. OFFSTEIN SUMMERHAYS
& SWOPE

BY: /S/ JERROLD N. OFFSTEIN
Attorneys for Plaintiffs

Pursuant to §631 of the California Code of Civil Procedure, jury trial in the instant matter is hereby demanded.

DATED: February 17, 1977.

LAW OFFICES OF JERROLD
N. OFFSTEIN SUMMERHAYS
& SWOPE

BY: /S/ JERROLD N. OFFSTEIN
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 77 0577

FLOYD R. BROWN, Individually and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NOTICE OF RELATED CASES

(Filed March 21, 1977)

In accordance with Local Rule 101, the undersigned counsel for defendants Federated Department Stores, Inc. and Saks & Company hereby advise the Court that the instant action, which was removed to this Court on this date, is related to seven other purported class actions, which have previously been related and assigned to the Honorable Spencer Williams, which actions have previously been dismissed. Included in such actions is the action entitled *Brown* v. *Federated Department Stores, Inc., et al.* which is an action filed by the plaintiff herein against defendants Federated and Saks.

Attached hereto as Exhibit A is a copy of an order assigning to Judge Williams the seven related actions: *Weinberg, et al.* v. *Federated Department Stores, Inc., et al.*, C-76-867-SW; *Eisenberg, et al.* v. *Federated Department Stores, Inc., et al.*, C-76-869-SW; *Moitie* v. *Federated Department Stores, Inc., et al.*, C-76-1110-SW; *Musser* v. *Federated Department Stores, Inc., et al.*, C-76-1363-SW; *Morgan* v. *Federated Department Stores, Inc., et al.*, C-76-1429-SW; *Brown* v. *Federated Department Stores, Inc., et al.*, C-76-1210-SW; and *Kimmel, et al.* v. *Federated Department Stores, Inc., et al.*, C-76-1671-SW.

Like the other related cases, the instant action is a purported class action seeking damages against Federated Department Stores, Inc. and Saks & Company, among others, which arises out of the same alleged facts. Accordingly defendants' counsel submit that the instant case is related to the prior seven actions, and request that it be assigned to Judge Williams.

DATED: March 21, 1977.

ARNOLD & PORTER
ABE KRASH
JEROME I. CHAPMAN
IRVIN B. NATHAN
LAWRENCE C. MAISEL

MCKENNA & FITTING
PAUL FITTING
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BY: /s/ CHARLES G. MILLER
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DONALD E. KELLEY, JR.

BY: /s/ JAMES T. FOUSEKIS
JAMES T. FOUSEKIS

Attorneys for Defendant
SAKS & COMPANY

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

(Filed August 30, 1976)

A notice of related cases has been filed suggesting that the following cases are related within the meaning of L. R. 101 or L. R. 200.

C-76-1210 RHS — *Brown* vs. *Saks, et al.*

C-76-869 SW — *Eisenberg* vs. *Saks, et al.*

C-76-867 SW — *Weinberg, et al.* vs. *Saks, et al.*

C-76-1363 SW — *Musser, et al.* vs. *Saks, et al.*

C-76-1110 SW — *Moitie* vs. *Saks, et al.*

C-76-1429 SC — *Morgan, et al.* vs. *Saks, et al.*

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are not related.

United States District Judge

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are related within the meaning of L. R. 101 or L. R. 200.

/s/ SPENCER WILLIAMS
United States District Judge

ORDER

It appearing to the Assignment Committee that these cases are related within the meaning of L. R. 101 or L. R. 200, it is ordered that all of such cases are reassigned to SPENCER WILLIAMS. Counsel are instructed that all future filings shall bear the initials SW immediately after the case number.

ASSIGNMENT COMMITTEE
By: /s/ ROBERT F. PECKHAM
Chief Judge

DATED: August 30, 1976

COPIES TO: Counsel
Courtroom Deputies
Special Projects
Case Systems Administrators

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

March 21, 1977

RELATED CASE ORDER

A notice of related cases has been filed suggesting that the following cases are related within the meaning of L. R. 101 or L. R. 200.

C-77-0577-RHS *Brown* v. *Federated Dept. Stores, Inc., et al.*

C-76-867-SW *Weinberg, et al.* v. *Federated Dept. Stores, Inc., et al.*

C-76-869-SW *Eisenberg, et al.* v. *Federated Dept. Stores, Inc., et al.*

C-76-1110-SW *Moitie* v. *Federated Dept. Stores, Inc., et al.*

C-76-1363-SW *Musser* v. *Federated Dept. Stores, Inc., et al.*

C-76-1429-SW *Morgan* v. *Federated Dept. Stores, Inc., et al.*

C-76-1210-SW *Brown* v. *Federated Dept. Stores, Inc., et al.*

C-76-1671-SW *Kimmel, et al.* v. *Federated Dept. Stores, Inc., et al.*

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are not related.

United States District Judge

As the Judge assigned the earliest filed case, I advise the Assignment Committee that these cases are related within the meaning of L. R. 101 or L.R. 200.

/s/ SPENCER WILLIAMS
United States District Judge

ORDER

It appearing to the Assignment Committee that these cases are related within the meaning of L. R. 101 or L. R. 200, it is ordered that all of such cases are reassigned to SPENCER WILLIAMS. Counsel are instructed that all future filings shall bear the initials SW immediately after the case number.

ASSIGNMENT COMMITTEE

BY: /s/ ROBERT PECKHAM
Chief Judge

DATED: March 21, 1977

COPIES TO: Counsel
Courtroom Deputies
Special Projects
Case Systems Administrators

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576-SW

MARILYN MOITIE, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NO. C-77-0577-SW

FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NOTICE OF MOTION AND MOTION OF DEFENDANTS FEDERATED DEPARTMENT STORES, INC. AND SAKS & COMPANY TO DISMISS

(Filed April 8, 1977)

TO PLAINTIFFS MARILYN MOITIE AND FLOYD R. BROWN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE, hereby given, that at 10:00 a.m. on Friday, April 29, 1977 in the Law and Motion Department of the Honorable Spencer Williams, United States District Court,

Northern District of California, defendants Federated Department Stores, Inc. and Saks & Company will move and do hereby move for an order dismissing the above actions on the grounds that they are barred by the doctrine of *res judicata*.

Said Motion will be made pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure and will be based on this Notice of Motion, the Memorandum of Points and Authorities filed herewith, the papers and files in these actions, and the papers and files in *Moitie* v. *Federated Dept. Stores, Inc., et al.*, C-76-1110-SW, and *Brown* v. *Federated Dept. Stores, Inc., et al.*, C-76-1210-SW, previously dismissed by this Court.

DATED: April 8, 1977.

ARNOLD & PORTER
ABE KRASH
JEROME I. CHAPMAN
LAWRENCE C. MAISEL
PAUL C. BESOZZI

McKENNA & FITTING
PAUL FITTING
CHARLES G. MILLER

BY: /s/ JEROME I. CHAPMAN
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FEDERATED DEPARTMENT STORES, INC.

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SOLINGER & GORDON
EUGENE H. GORDON
JOHN C. GROSZ

BY: /s/ JAMES T. FOUSEKIS
JAMES T. FOUSEKIS

Attorneys for Defendant
SAKS & COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576-SW

MARILYN MOITIE, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORE, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NO. C-77-0577-SW

FLOYD R. BROWN, individually and on behalf of others similarly situated,

Plaintiffs,

v

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

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I.

Introduction

The complaints in these cases may well seem familiar, since they have been in this Court before. Complaints substantially identical to the present ones were filed last year on behalf of plaintiffs Moitie and Brown. Those two complaints, along with five other related purported class actions, essentially tracked the allegations of an indictment and civil complaint filed by the United States charging the defendants with a conspiracy to fix the prices of women's clothing. All of the plaintiffs complained that they were injured by being overcharged for women's clothing purchased from defendants during the alleged conspiracy.

All seven related cases, including *Moitie* and *Brown*, were dismissed "in their entirety" by this Court's orders of January 11 and 13, 1977, granting the defendants' motions to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) (6) of the Federal Rules of Civil Procedure. The plaintiffs in the five other related cases filed appeals, which are now pending in the Ninth Circuit Court of Appeals.

Moitie and Brown chose not to appeal from this Court's final judgment. Instead, they filed second complaints — which are in most respects verbatim copies, except for a superficial change in legal theories, of their previously dismissed complaints — in the Municipal Court for the Palo Alto-Mountain View Judicial District. These actions were removed by defendants to this Court.

This effort by Moitie and Brown to circumvent this Court's prior judgment and relitigate their claims in another forum is barred by the well-established principle of *res judicata*. That doctrine provides that a judgment on the merits in a prior suit absolutely bars a second suit on the same claim. It applies not only to suits raising issues which were previously litigated, but also to suits raising issues which

could have been but were not litigated in the prior actions. The applicability of these principles to the present case is clear:

First, the dismissal of plaintiffs' prior complaints from which they chose not to appeal was a final judgment on the merits for purposes of *res judicata*. It is well settled in the Ninth Circuit and elsewhere that a dismissal for failure to state a claim upon which relief can be granted is a final judgment on the merits.

Second, the claim asserted in Moitie's and Brown's second complaints is identical to that involved in the previously-dismissed actions. Both actions involve the same parties, arise out of precisely the same alleged wrong by defendants, and involve precisely the same alleged injury to the plaintiffs. Indeed, the subsequent complaints are practically verbatim copies of the complaints which the Court dismissed.

Finally, it is clearly established in the Ninth Circuit and elsewhere that a mere change in legal theories is not sufficient to evade the basic principles of *res judicata*. The unequivocal precedents in this area are particularly persuasive here where both the "newness" and the substantiality of plaintiffs' supposed "new theories" are questionable.

Plaintiffs have had a fair opportunity to litigate their claims against defendants in this Court. They had, and voluntarily abandoned, the right to appeal from this Court's final judgment against them. They cannot now be allowed to trifle with this Court's jurisdiction and burden the defendants with vexatious, duplicative litigation.

II.

Statement Of The Case

Defendants are engaged in the business of selling women's clothing to the general public at retail through retail stores located in California and elsewhere. Plaintiffs are members of the general public who allege that they purchased

women's clothing at retail from both defendants, and they purport to represent various classes of other retail purchasers of women's clothing.[1]

A. The First *Moitie* and *Brown* Complaints and Their Dismissal

On April 28, 1976, the United States filed in this Court an indictment and a civil complaint for an injunction charging that defendants, Federated Department Stores, Inc. d/b/a I. Magnin & Co. and Saks & Company, d/b/a Saks Fifth Avenue, had agreed to fix the retail prices of women's clothing sold by them to the general public in Northern California from as early as 1963 until April 1974.[2] The next day, two purported class action complaints were filed in this Court.[3] And a week later, on May 6, 1976, plaintiff Moitie filed a similar complaint in the California Superior Court for

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[1] The alleged classes are defined in the complaints as follows:

Moitie — All persons residing in Santa Clara and San Mateo counties who, from 1963 to the present, made retail purchases of women's clothing (i) from I. Magnin on a charge basis, (ii) from I. Magnin on a check or cash basis, (iii) from Bullock's Northern California (a separate Federated division from I. Magnin) on a charge basis, (iv) from Bullock's Northern California on a check or cash basis, (v) from Saks on a charge basis, and (vi) from Saks on a check or cash basis.

Brown — All persons residing in certain Southern California counties who, from 1963 to the present, made retail purchases of women's clothing (i) from I. Magnin on a charge basis, (ii) from I. Magnin on a check or cash basis, (iii) from Bullock's (a separate Federated division from I. Magnin) on a charge basis, (iv) from Bullock's on a check or cash basis, (v) from Saks on a charge basis, and (vi) from Saks on a check or cash basis.

[2] *United States* v. *Federated Dept. Stores, Inc., et al.*, CR-76-236 SAW; *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858 RHS. The criminal action has been concluded; the civil action is still pending in this Court.

[3] *Weinberg* v. *Federated Dept. Stores, Inc., et al.*, C-76-867-SW; *Eisenberg* v. *Federated Dept. Stores, Inc., et al.*, C-76-869-SW.

Santa Clara County. The *Moitie* complaint was removed to this Court on June 1, 1976. (*Moitie* v. *Federated Dept. Stores, Inc., et al.*, "First *Moitie* Complaint," C-76-1110 SW.) Subsequently, four additional similar complaints were filed in this Court, including a complaint filed by plaintiff Brown on June 15, 1976. (*Brown* v. *Federated Dept. Store, Inc., et al.*, "First *Brown* Complaint," C-76-1210-SW.)[4] All seven cases were found to be related and assigned to the Honorable Spencer Williams under Local Rule 101. The Notice of Related Cases in the *Brown* case was filed by Brown's attorney.

The central allegations of all seven related complaints, including the First *Moitie* and *Brown* Complaints — *i.e.*, the description of the defendants, the trade and commerce affected, the alleged acts and the effects thereof — were essentially verbatim copies of the parallel allegations in the government actions. In substance, all the complaints alleged a conspiracy between defendants to fix the retail prices of women's clothing sold to plaintiffs and the classes they purported to represent. In addition, all the complaints contained similar allegations that the defendants had fraudulently concealed the alleged price fixing conspiracy. All plaintiffs claimed that this alleged price fixing conspiracy injured them by causing them to pay higher prices for the women's clothing they allegedly purchased from defendants.

The complaints asserted a number of legal theories. The complaints originally filed in this Court, including the First *Brown* Complaint, alleged that their claim for damages was supported by Section 4 of the Clayton Act. 15 U.S.C. § 15. Some of these complaints, including the First *Brown* Complaint, also included a prayer for injunctive relief based on Section 16 of the Clayton Act, 15 U.S.C. § 26. The two

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[4] The other related cases were: *Musser* v. *Federated Dept. Stores, Inc., et al.*, C-76-1363-SW (removed from the Superior Court of San Francisco); *Morgan* v. *Federated Dept. Stores, Inc., et al.*, C-76-1429-SW; and *Kimmel* v. *Sommerfield, et al.*, C-76-1671-SW.

complaints which were removed from the State courts, *Musser* and the First *Moitie* Complaint, purported to support their claim under Section 16720 of the California Business and Professions Code (antitrust) and Section 3369 of the California Civil Code (unfair business practices).

The defendants filed answers to a number of the complaints, including the First *Moitie* and *Brown* Complaints,[5] denying the substantive allegations and pleading a number of affirmative defenses, including the failure to state a claim upon which relief can be granted.

On July 25, 1976, the defendants moved to dismiss the complaints for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants' motion rested on four grounds. The two arguments directed to those complaints, such as the First *Brown* Complaint, which had relied on Sections 4 and 16 of the Clayton Act were: (i) that the plaintiffs were not entitled to relief since they were not injured in their "business or property" within the meaning of Section 4 and (ii) that the plaintiffs had not suffered irreparable injury cognizable in equity under Section 16. The two arguments directed towards those complaints, such as the First *Moitie* Complaint, which purported to rest on California law were: (i) that the complaints were in substance and reality the same as the cases originally filed in federal court and therefore should be governed by the same legal theories and (ii) that, in any event, the complaints did not state a claim for relief under California law.

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[5] With respect to the First *Moitie* Complaint, defendant Saks filed its answer on June 21, 1976, and defendant Federated filed its answer on June 22, 1976. With respect to the First *Brown* Complaint, defendant Federated filed its answer on June 22, 1976, and defendant Saks filed its answer on July 9, 1976. Conditional counterclaims were filed by defendants to the *Moitie* and *Brown* Complaints and were answered by plaintiffs Moitie and Brown.

Extensive briefs were filed by counsel for all parties, and a lengthy oral argument was held before this Court on September 16, 1976[6]

On January 11, 1977, this Court filed a carefully considered Memorandum Order granting the defendants' motion to dismiss "in its entirety" each of the first five complaints, including the First *Moitie* Complaint. On January 13, 1977, this Court dismissed the two remaining complaints, including the First *Brown* Complaint, "in their entirety" on the basis of the prior order in the other related cases.

The plaintiffs in five of the related cases filed notices of appeal to the United States Court of Appeals for the Ninth Circuit. No appeals were filed from this Court's final judgments dismissing the First *Moitie* and *Brown* Complaints, and the time for appeal in those cases has expired.

B. The Second Moitie and Brown Complaints

On February 13, 1977, the attorney who had represented both Moitie and Brown in the dismissed actions filed a second complaint against the same defendants on behalf of Moitie and the same purported classes she had claimed to represent in the First *Moitie* Complaint. On February 17, 1977, the same attorney filed a second complaint against the same defendants on behalf of Brown and essentially the same purported classes he had claimed to represent in the First *Brown* Complaint. Both of these second complaints were filed in the California Municipal Court for the Palo Alto-Mountain View Judicial District, were served on February 18, 1977 and were removed to this Court on March 21, 1977, pursuant to 28 U.S.C. § 1441.

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[6] There was no brief filed specifically on behalf of plaintiff Brown because his case had not been related to the others at the time the motion to dismiss was filed. The same counsel represented both Brown and Moitie, however, and he participated in both the briefing and the oral argument. It was clearly understood that the same arguments made in the other related cases were fully applicable to Brown. (See this Court's order dismissing First *Brown* Complaint, January 13, 1977.)

The Second *Moitie* and *Brown* Complaints are, for the most part, identical to the First *Moitie* and *Brown* Complaints, which in turn were substantially identical to the complaints in the government actions and the other five ensuing private purported class actions.

The following allegations in the Second Complaints, which set forth the essential elements of the plaintiffs' claim, are, with the few minor exceptions indicated in the Appendix hereto,[7] *verbatim copies* of the allegations of the First Complaints:

(i) Class action allegations;

(ii) Description of the plaintiffs;

(iii) Description of the defendants;

(iv) Description of "Does";

(v) Description of agents and co-conspirators;

(vi) Description of the trade and commerce allegedly affected;

(vii) Statement of the "offenses charged," *i.e.*, the basic allegations of the alleged wrong committed by defendants against the plaintiffs;

(viii) Statement of the alleged "effects" of the defendants' alleged offenses;

(ix) Statement of the alleged injury to the plaintiffs; and

(x) Allegations of fraudulent concealment.

After thus setting forth the basic statement of the claim in terms nearly identical to those which appear in the First *Moitie* and *Brown* Complaints, the Second Complaints conclude with prayers for relief which also are substantially similar to those in the First Complaints. Using language which

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[7] The specific portions of the Second Complaints in which these various allegations are set forth, and the parallel portions of the First Complaints in which virtually identical allegations appear, are discussed in detail in Appendix A to this Memorandum.

is identical to that in the First Complaints, the plaintiffs in their Second Complaints request a judgment:

(i) "That this is a proper class action";

(ii) "That defendants and co-conspirators have engaged in an unlawful conspiracy and combination to restrain trade and commerce in women's clothing in" the geographic area involved; and

(iii) "That plaintiff and members of the classes have been proximately injured by one or more of the above alleged unlawful acts."

Like the First Complaints, the Second Complaints also seek damages, attorneys' fees and costs. While the Second Complaints, unlike their respective predecessors, do not seek treble damages, they do request "appropriate multiple damages, and exemplary and punitive damages" with interest.

The primary ostensible difference between the First and Second Complaints in these cases is that the Second Complaints purport to state four legal theories of recovery which had not been expressed in precisely the same terms in the First Complaints. While these theories are variously stated, they are all predicated on the basic allegation noted above — *i.e.*, that defendants conspired to fix the price of women's clothing and thereby caused plaintiffs to overpay for the clothing they purchased from defendants during the period of the conspiracy.

The first such theory is denominated "fraud and deceit." (Second *Moitie* and *Brown*, ¶ XI.) The Second Complaints assert that the defendants fraudulently represented that their prices for women's clothing were "fair" retail prices "and not pursuant to a price fixing scheme as hereinbefore charged." (*Id.*) The First Complaints had alleged that the defendants fraudulently "took measures to conceal . . . the violations hereinabove alleged." (First *Moitie*, ¶ X; First *Brown*, ¶ VIII.)

The next theory, denominated "unfair business practices," is predicated on the assertion that the alleged "price-fixing conspiracy, and its attendant credit balance abuse, are a prohibited unfair business practice." (Second *Moitie* and *Brown*, ¶ XII.) California Civil Code Section 3369, which proscribes "unfair business practices," was relied upon in the First *Moitie* Complaint. (First *Moitie*, prayer for relief, ¶ 6.)[8]

The third theory set forth in the Second Complaints, denominated "civil conspiracy," is based on the assertion that defendants illegally fixed prices pursuant to a conspiracy. (Second *Moitie* and *Brown*, ¶ XIII.) The First *Moitie* and *Brown* Complaints also expressly charged defendants with engaging in an unlawful price-fixing conspiracy.

The final theory, "restitution of moneys had and received," is based on the assertion that defendants have wrongfully retained moneys of the plaintiffs "by reason of the effectiveness of the aforesaid conspiracy." (Second *Moitie* and *Brown*, ¶ XIV.) The same basic allegation — that plaintiffs were forced to overpay for purchases as a result of defendants' alleged conspiracy — was made in the First Complaints. (See First *Moitie*, ¶ IX; First *Brown*, ¶ VII.)

III.

The Doctrine of *Res Judicata* Requires Dismissal Of The Complaints, Because This Court Has Already Rendered A Final Judgment On The Merits Of The Plaintiffs' Claims

A. The Doctrine of *Res Judicata* is a Rule of Fundamental Importance in the Administration of Justice

The doctrine of *res judicata* provides that "a judgment 'on the merits' in a prior suit involving the same parties or

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[8] California Civil Code Section 3369 was also relied on in one of the other related cases which was dismissed along with the First *Moitie* and *Brown* Complaints and which is now pending on appeal to the Ninth Circuit. *Musser* v. *Federated Dept. Stores, Inc., et al.*, C-76-1363 SW, Complaint ¶¶ 19-21, prayer for relief ¶ 3.

their privies bars a second suit based on the same cause of action." *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955); *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316, 319 (1927); *Flynn* v. *State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969). That doctrine also bars a subsequent suit on the same claim raising "issues which could have been but were not raised and litigated in the suit." *Heiser* v. *Woodruff*, 327 U.S. 726, 735 (1946). As the Supreme Court held in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 597 (1948), after a final judgment on the merits of a cause of action has been entered,

> ". . . the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'. . . . *The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever*, absent fraud or some other factor invalidating the judgment." (Emphasis added)

The Supreme Court has repeatedly stressed the overriding importance of this doctrine. The Court stated in *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917):

> "The doctrine of res judicata is not a mere matter of practice of procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace'. . . ."

The Court has also made clear that there is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata. . . ." *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946).

The doctrine of *res judicata* prevents endless and repetitious litigation and protects the finality of judgments. It thereby furthers two important policies, certainty in legal relations and judicial economy.

Plaintiffs' Second Complaints in these cases, which are almost entirely copies from their dismissed First Complaints, clearly contravene these sound principles.

B. The Doctrine of *Res Judicata* is Squarely Applicable to the Present Complaints

This Court's orders of January 11 and 13, 1977 dismissing the First *Moitie* and *Brown* Complaints were final judgments on the merits on the same cause of action asserted in the Second *Moitie* and *Brown* Complaints. This being so, the Second Complaints are barred by *res judicata*.

1. *This Court's Dismissals of the Prior Moitie and Brown Actions Were Final Judgments on the Merits*

This Court's orders in the predecessor actions dismissed each complaint "in its entirety." This Court did not reserve jurisdiction or leave any issues open for further litigation. Plaintiffs Moitie and Brown could have filed appeals from this Court's adverse final judgments, as did the plaintiffs in the five other related cases, but they chose not to do so. Thus, the finality of the earlier judgments cannot be contested.

Similarly, this Court's dismissal of Moitie's and Brown's complaints for failure to state a claim upon which relief could be granted was clearly a decision "on the merits." As the Supreme Court noted in *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947), "[i]t is a misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issue of a litigation." See *Schmieder* v. *Hall*, 545 F.2d 768, 771 (2d Cir. 1976) (dismissal of prior fraud action for lack of standing or, in the alternative, for failure to establish a right to relief, barred second suit on theory of unjust enrichment); and *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F.2d 464 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951) (dismissal of Clayton Act suit on statute of limitations grounds barred Sherman Act suit arising out of the same factual situation).

The courts of appeals in practically every circuit, including the Ninth Circuit, have repeatedly made clear that a dismissal for failure to state a claim upon which relief can be granted is a final adjudication on the merits which invokes the bar of *res judicata*.[9]

In *Wight* v. *Montana-Dakota Utilities Co.*, 299 F.2d 470 (9th Cir. 1962), *cert. denied*, 371 U.S. 962 (1963), the Ninth Circuit affirmed a district court's dismissal of certain counterclaims on res judicata grounds. Those counterclaims had formed the basis of a prior lawsuit which had been dismissed for failure to state a claim upon which relief could be granted because of failure to exhaust administrative remedies.[10] Other counterclaims had been raised in another prior suit. The Ninth Circuit held that the judgments in both prior cases "were final judgments on the merits" which precluded relitigation of the same claims. 299 F.2d at 478.[11]

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[9] *Accord*: *Hall* v. *Tower Land and Investment Co.*, 512 F.2d 481, 483 (5th Cir. 1975); *Glick* v. *Ballentine Produce, Inc.*, 397 F.2d 590, 593 (8th Cir. 1968); *Arrowsmith* v. *United Press International*, 320 F.2d 219, 221 (2d Cir. 1963); *Bartsch* v. *Chamberlin Co. of America*, 266 F.2d 357, 358 (6th Cir. 1959); *Sardo* v. *McGrath*, 196 F.2d 20, 24 (D.C. Cir. 1952); *Preston* v. *Kaw Pipe Line Co.*, 128 F.2d 162, 164-65 (10th Cir. 1942), *cert. denied*, 317 U.S. 674 (1942); *Schram* v. *Poole*, 111 F.2d 725, 727 (9th Cir. 1940).

[10] The prior dismissal was in *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 103 F.Supp. 666 (D. Mont. 1951), *appeal dismissed*, 194 F.2d 705 (9th Cir.), *cert. denied*, 344 U.S. 827 (1952).

[11] In determining whether the resolution of a particular claim constitutes an "adjudication on the merits," many reported decisions rely in large measure upon Federal Rule of Civil Procedure 41(b), which states, in relevant part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for under this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

See, e.g., *Hall* v. *Tower Land and Investment Co.*, 512 F.2d 481, 483 (5th Cir. 1975); *Papilsky* v. *Berndt*, 466 F.2d 251, 254-55 (2d Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972); *Bartsch* v. *Chamberlin Co. of America*, 266 F.2d 357, 358 (6th Cir. 1959).

2. *Plaintiffs' New Complaints Raise Exactly the Same Claims as Their Previous Suits*

There can be no doubt that Moitie and Brown are attempting in their present actions to recover on the same claims that were previously dismissed by this Court. In determining for *res judicata* purposes whether two complaints assert the same claims, "the primary test . . . has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action." *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30, 32 (8th Cir. 1964). It is clear that the wrongful violation of their rights complained of by the plaintiffs — overcharging on women's clothing by virtue of a price fixing conspiracy — is precisely the same in both the First and Second Complaints involved here.

The governing test was described by the Supreme Court in *Baltimore Steamship Co.* v. *Phillips*, 274 U.S. 316 (1927). There, the plaintiff first brought a libel in admiralty alleging an injury caused by the defendant's negligent failure to provide a safe place to work. When he was unsuccessful, plaintiff filed another suit alleging that defendant was negligent in its control of the vessel and its equipment. The Supreme Court held that the second action was barred by *res judicata*. The Court stated (274 U.S. at 321):

> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.
>
> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result,

> whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action."

This approach has been followed in numerous cases which closely parallel the situation presented by the present plaintiffs' duplicative actions. For example, in *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961), the plaintiff brought two suits in the same court, one alleging violations of the antitrust laws and the other alleging a breach of contract. The contract case was resolved first by a verdict against the plaintiff. The Fifth Circuit affirmed the dismissal of the antitrust action on grounds of *res judicata*, holding that the plaintiff was seeking to recover for the same injury:

> "Basically, Norman claimed the same 'right' in both suits — the right to purchase Gillette products direct from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman . . . . [T]here was one breach and one only and appellant has had its day in court and has lost. It cannot litigate this same breach again . . . . The mere fact that in the case already decided Gillette's refusal to sell was alleged to have been wrongful for one reason and, in the present case for another reason, does not alter the fact that the cause of action was for the same injury." 295 F.2d at 363-64.

Similarly, in *Englehardt* v. *Bell & Howell Co., supra*, plaintiff had initiated three previous actions in the Missouri state courts alleging violations of the Missouri antitrust statutes. After removal to the federal court, all three were dismissed for varying reasons. Plaintiff then brought a fourth action under the Federal Antitrust laws. Affirming the District Court's dismissal on grounds of *res judicata*, the Court of Appeals noted:

> "The more specific allegations of interference with interstate commerce in the present complaint and the

> variance in the amount of damages claimed are insufficient to establish that the present cause of action is different from that pleaded in the prior actions. Obviously, interstate commerce was involved in the prior actions as the shipments previously made to plaintiff came largely from defendant's plant located outside Missouri. In any event, the basic wrong asserted by the plaintiff in all cases was the defendant's wrongful invasion of plaintiff's right to handle defendant's products by individual action and by wrongful action taken in concert with others, and the causal connection between defendant's act and injuries." 327 F.2d at 34.[12]

The so-called "primary right" theory is equally well established under California law. Many California cases hold that the invasion of a single "primary right" of a plaintiff gives rise to but one cause of action; this "cause of action" is based upon the harm suffered by the plaintiff, not the particular legal theory or theories asserted in the lawsuit, and multiple litigation of such a single cause of action is barred by *res judicata* and related principles. *Wulfjen* v. *Dolton*, 24 Cal.2d 891, 895-96, 151 P.2d 846 (1944); *Slater* v. *Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593 (1975); *Panos* v. *Great Western Packing Co.*, 21 Cal.2d 636, 637-38, 134 P.2d 242 (1943).

The foregoing principles are fully applicable here. The plaintiffs' present actions complain of exactly the same legal wrong and injuries as did their previously-dismissed suits. In both sets of actions, plaintiffs complained that defendants had engaged in a continuing conspiracy "to raise, fix, maintain and stablize prices" in the sale of women's clothing. The injuries alleged were also identical, namely that plaintiffs

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[12] *See also*, *F.L. Mendez & Co.* v. *General Motors Corp.*, 161 F.2d 695, 698 (7th Cir. 1947) (Sherman Act and Clayton Act claims involved same cause of action since there was only one injury arising out of a single wrong); *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, 438 F.2d 1286, 1313-15 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

"have been forced to pay substantial overcharges on retail purchases of women's clothing." The prior actions were dismissed by final judgments from which no appeals were taken. Therefore, *res judicata* requires that the present, carbon-copy complaints cannot be allowed to stand.

3. *Plaintiffs' Change of Legal Theories Does Not Permit Relitigation of Their Claims*

Plaintiffs cannot avoid the applicability of the well-established principle of *res judicata* by the simple trappings of additional legal theories. The courts have repeatedly held that a plaintiff cannot relitigate the same claim, against the same defendants, based on the same facts, merely by changing legal theories. Plaintiffs were required to set forth all of their theories of recovery in their first suits.

The Ninth Circuit has dealt with this "change in theories" issue on at least four occasions, always with the same result — the subsequent suits were dismissed. In *McCarthy* v. *Noren*, 370 F.2d 845 (9th Cir. 1967), *cert. denied*, 387 U.S. 917 (1967), plaintiff filed two actions which were identical except that the first alleged arbitrary and capricious action under the Administrative Procedure Act while the second raised due process issues. After the first action had been dismissed, the Court of Appeals, reversing the District Court, held that the second action was barred by *res judicata*. The Court stated:

> "The only new element in the second complaint is the legal theory urged by the appellees that they were not accorded procedural due process under the Fifth Amendment to the United States Constitution . . . . *The assertion of a different legal theory in the second complaint is not the same as the urging of a separate and distinct cause of action.* The first decision was res judicata and this case must be reversed." 370 F.2d at 847. (Emphasis added.)

In *Small Business Administration* v. *Taubman*, 459 F.2d 991 (9th Cir. 1972), the Ninth Circuit applied the doctrine of *res judicata* to affirm the dismissal of a counterclaim which the Court determined had been adjudicated in a previous suit. The Court stated:

> "It does not matter that Taubman's legal theories of 'conspiracy' and 'joint venture' between Joseph Newman and Newman Capital differ from the alter ego theory asserted by Olympic in the prior action." 459 F.2d at 992.

Similarly, in *Johnson* v. *Dept. of Water & Power of The City of Los Angeles*, 450 F.2d 294 (9th Cir. 1971), *cert. denied*, 405 U.S. 1072 (1972), the Ninth Circuit affirmed the dismissal of a subsequent suit which was based on the same operative facts as three prior actions:

> "Appellant had every opportunity to present his side of the case in the state courts. *He cannot now reinstitute the same cause, against the same defendants, based on the same facts, by merely changing his legal theory and crossing from the state to the federal courthouse.*" 450 F.2d at 295. (Emphasis added)

Finally, in *Scoggin* v. *Schrunk*, 522 F.2d 436 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976), the Ninth Circuit dismissed a suit alleging a constitutional claim on the ground that it asserted the same legal wrong as a prior state court suit. The Court held that a single cause of action cannot be fragmented and litigated piecemeal:

> ". . . [i]t is now established that where the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, *res judicata* will bar the federal constitutional claim whether it was asserted in state court or not, for the reason that the state judgment on the merits serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been

raised in support of the granting of the desired relief. 'Appellant is not permitted to fragment a single cause of action and to litigate piecemeal the issues which could have been resolved in one action.' " 522 F.2d at 437.

Perhaps the most frequently-cited case dealing with changes in legal theories is *Williamson* v. *Columbia Gas & Electric Corp.*, *supra*. In that case, plaintiff brought successive suits in the same court within eight months of each other. The first alleged a conspiracy under the Sherman Act, and the second, a violation of the Clayton Act. After the second action was determined to be barred because of the statute of limitations, the Third Circuit affirmed the dismissal of the first suit on grounds of *res judicata*. The Court stated:

"As pointed out above, the acts complained of and the demand for recovery are the same. The only thing that is different is the theory of recovery. . . . *The plaintiff having alleged operative facts which state a cause of action because he tells of defendant's misconduct and his own harm has had his day in court. He does not get another day after the first lawsuit is concluded by giving a different reason than he gave in the first for recovery of damages for the same invasion of his rights.* The problem of his rights against the defendant based upon the alleged wrongful acts is fully before the court whether all the reasons for recovery were stated to the court or not." 186 F.2d at 470.[13] (emphasis added).

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[13] *Accord*, *Schmieder* v. *Hall*, 545 F.2d 768, 771 (2d Cir. 1976); *Moreno* v. *Marbil Productions, Inc.*, 296 F.2d 543, 544-45 (2d Cir. 1961); *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, 109 F.2d 623, 627 (5th Cir. 1940), *cert. denied*, 310 U.S. 653 (1940); *McLaughlin* v. *Penn Central Transp. Co.*, 384 F.Supp. 179, 187 (S.D.N.Y. 1974); *Joseph* v. *House*, 353 F.Supp. 367, 372 (E.D. Va. 1973); *Denckla* v. *Maes*, 313 F.Supp. 515, 521 (E.D. Pa. 1970); *St. Louis Typographical Union No. 8* v. *Herald Co.*, 277 F.Supp. 276, 280-81 (E.D. Mo. 1967); *aff'd*, 402 F.2d 553 (8th Cir. 1968); *Wolcott* v. *Hutchins*, 245 F.Supp. 578, 581 (S.D.N.Y. 1965), *aff'd*, 365 F.2d 833 (2d Cir. 1966); *Sexton* v. *United States*, 238 F.Supp. 221, 223 (N.D. Ill. 1965); *Brickel* v. *Chicago, Burlington and Quincy R.R. Co.*, 200 F.Supp. 240, 241 (D. Wyo, 1961); *Mathews* v. *New York Racing Ass'n.*, 193 F.Supp. 293, 295 (S.D.N.Y. 1961).

California cases likewise consistently hold that a mere change in the plaintiff's legal theories cannot circumvent the bar raised by a prior adjudication of a claim arising out of a single set of operative facts. As the Court stated in *Slater* v. *Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225, 543 P.2d 593 (1975):

> "It is true that plaintiff has asserted different legal theories in the instant case and in her 1970 complaint. However, the 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. (*Peiser* v. *Mettler*, (1958) 50 Cal.2d 594, 605 [328 P.2d 953, 74 A.L.R.2d 1]. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal* ground for relief.' [Citations.]" (Emphasis in original.)

See also Panos v. *Great Western Packing Co.*, 21 Cal.2d 636, 638-39, 134 P.2d 242 (1943); *Ford Motor Co.* v. *Superior Court*, 35 Cal.App. 3d 676, 679, 110 Cal. Rptr. 59 (1973).

There is substantial room for doubt as to whether the "new theories" put forth by plaintiffs in their Second Complaints are really "new." Allegations of fraud, conspiracy, and overpayment of money were asserted in both predecessor complaints and the California statutory theory of "unfair business practices " was asserted in the First *Moitie* Complaint. In essence, the Second Complaints are merely thinly disguised restatements of the alleged antitrust violations set forth in the First Complaints.

Moreover, there is a substantial question as to the viability of the putative theories set forth in the Second Complaints as a basis for recovery. For example, the alleged "fraud" claim presents a novel legal theory, to say the least.

Defendants are unaware of any cases holding that any implied representation arises simply from marking a retail price on an item; moreover, ordinary human experience strongly suggests that no implication as to the origin of a particular price can rationally be drawn in such circumstances. Similarly, while the third alleged claim is styled a claim for "civil conspiracy," it is clear that California law does not recognize the existence of any separate and independent cause of action for "civil conspiracy." See, *e.g.*, *Widdows* v. *Koch*, 263 Cal.App.2d 228, 234, 69 Cal.Rptr. 464 (1968).

But whatever the potential legitimacy of these "new theories," sound principles of judicial administration preclude their consideration. Plaintiffs, like those in the related cases, had their opportunity to litigate their claims. When their complaints were dismissed, they had an opportunity to appeal. They cannot now be allowed to circumvent the judgment of this Court by attempting to re-open the same claims in another forum. The substantial policies favoring an end to litigation and the proper respect for this Court's final judgments require that these duplicative actions be dismissed.

IV

The Rule Against Splitting Causes Of Action Also Bars The Second Complaints Herein

Many courts also bar relitigation purporting to rest on supposed "new theories" under the rubric of the rule against splitting causes of action. This rule has been consistently applied by both the federal courts and California courts. For example, in *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), the United States attempted to argue that certain land belonged to an Indian tribe rather than to the private defendant. The Court held, however, that this action was barred by a prior suit which had been brought by the United States for forfeiture of the same land on the ground

that the patents covering the land were invalid. Justice Holmes, writing for the majority, stated:

> "[T]he whole tendency of our decisions is to *require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and, a fortiori, he cannot divide the grounds of recovery.*" 192 U.S. at 358 (emphasis added).

In short, a plaintiff cannot present his claims in a piecemeal fashion. He must raise at the first opportunity all grounds which he intends to urge in support of his claim; otherwise, he will be held to have abandoned all such grounds not raised in the first instance, and will be barred from raising them again in a later suit. This principle has been reaffirmed in many decision of the federal courts of appeals, including several of the decisions quoted in the preceding section. *Scoggin* v. *Schrunk, supra; McCarthy* v. *Noren, supra; Williamson* v. *Columbia Gas & Electric Corp., supra.*[14]

In California, the leading case on this subject is *Wulfjen* v. *Dolton*, 24 Cal.2d 891, 151 P.2d 846 (1944), in which the California Supreme Court analyzed the rule as follows:

> "The rule against splitting a cause of action is based upon two reasons: (1) That the defendant should be protected against vexatious litigation; and (2) *that it is against public policy to permit litigants to consume the time of the courts* by relitigating matters already judicially determined, or *by asserting claims which properly should have been settled in some prior action.* Thus, it is said in *Bingham* v. *Kearney, supra*, [136 Cal.] at page 177, [68 P. at page 597]: 'It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation.' " 24 Cal.2d at 894-95, 151 P.2d at 848 (emphasis added).

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[14] *See also* cases cited in footnote, page 15, *supra.*

Affirming a judgment for the defendants on this basis, the Court concluded:

> "If plaintiff, through negligence in not properly presenting her claim in the first instance, has lost her right to recover money which she allegedly advanced in reliance upon fraudulent representations of said individual defendants, it is a hardship but one from which the courts cannot relieve if the general and well-established rule against the splitting of a single cause of action is to be followed for the benefit of all. To adopt any other view of this case would open a 'Pandora's box' of evils that would upset all legal principles for avoiding multiple litigation in settlement of but one fundamental claim for appropriate redress." 24 Cal.2d at 896, 151 P.2d at 849.

The application of the rule against splitting causes of action, in circumstances closely analogous to those presented in the cases at bar, is best illustrated by *Ford Motor Co.* v. *Superior Court*, 35 Cal.App.3d 676, 110 Cal.Rptr. 59 (1973).

The plaintiff in the *Ford* case, Cartrade, Inc., originally sued Ford in federal court for alleged Sherman Act violations. This suit resulted in a direct verdict which was ultimately affirmed on appeal. *Cartrade, Inc.* v. *Ford Dealers Adv. Ass'n of So. Cal.*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972). Meanwhile, plaintiff had filed a second action in state court against the same parties claiming that the same alleged acts by defendants violated California state antitrust statutes. Defendants' motion for summary judgment was denied by the trial court, whereupon the California Court of Appeal issued a writ of mandate to compel the granting of the motion in favor of defendants.

In reaching this result, the Court of Appeal first noted that both actions, while seeking different forms of relief and resting upon different legal theories, were founded upon alleged interference with a single "primary right" of the plaintiff, namely its right to practice its business, and that

both lawsuits therefore arose from the same alleged "cause of action." 35 Cal. App.3d at 679. The court then noted that under established principles of pendent jurisdiction, plaintiff's state law claims *could have been raised and resolved* in the original proceedings in federal court. *Id.* Based on these circumstances, the court held that the state action was barred:

> "As its federal claim was substantial and Cartrade could and should have sued for both federal and state relief in its earlier federal action, its failure to do so constituted splitting of its one cause of action." 35 Cal.App.3d at 680.

In conclusion, it is clear, under both federal and California authorities and under both the concept of *res judicata* and the rule against splitting of causes of action, that this Court's dismissal of the plaintiffs' First Complaints bars further litigation on the duplicative Second Complaints.

V

Conclusion

For the foregoing reasons, the complaints should be dismissed.

DATED: April 8, 1977.

Respectfully Submitted,

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APPENDIX A

Allegations of the Second *Brown* Complaint and Second *Moitie* Complaint, which, except as noted below, are *verbatim* copies of allegations contained in the First *Brown* and *Moitie* Complaints:

(i) *Class action allegations*: Second *Moitie*, ¶ I (1 & 2), First *Moitie*, ¶ I; Second *Brown*, ¶ I (1 & 2), First *Brown*, ¶ I(3). The class action allegations in Second *Brown* are identical to those in First *Brown* except for (i) a slight modification in the first sentence and (ii) the inclusion of four additional Los Angeles area counties in the Second *Brown* Complaint.

(ii) *Description of the plaintiffs*: First and Second *Moitie*, ¶ II; First and Second *Brown*, ¶ II.

(iii) *Description of the defendants*: First and Second *Moitie*, ¶ III; First and Second *Brown*, ¶ III. The only difference between these allegations in the First and Second *Brown* Complaints is that the former alleged that Federated did business under the name of "Bullock's Southern California" with its principal offices in Los Angeles, while the latter substitutes the name "Bullock's" and alleges that its principal offices are in Palo Alto.

(iv) *Description of "Does"*: First and Second *Moitie*, ¶ IV. No "Does" were alleged in the First *Brown* Complaint, but the "Doe" allegation in Second *Brown* is a verbatim copy of the "Does" paragraph in First *Moitie*.

(v) *Description of agents and co-conspirators*: First and Second *Moitie*, ¶ V; Second *Brown*, ¶ V, First *Brown*, ¶ IV.

(vi) *Description of the trade and commerce allegedly affected*: First and Second *Moitie*, ¶ VI; Second *Brown*, ¶ VI, First *Brown*, ¶ V.

(vii) *Statement of the "offenses charged," i.e., the basic allegations of the alleged wrong committed by defendants against the plaintiffs*: First and Second *Moitie*, ¶ VII; Second *Brown*, ¶ VII, First *Brown*, ¶ VI.

(viii) *Statement of the alleged "effects" of the defendants' alleged offenses"*: First and Second *Moitie* and Second *Brown*, ¶ VIII.*

(ix) *Statement of the alleged injury to the plaintiffs*: First and Second *Moitie*, ¶ IX; Second *Brown*, ¶ IX, First *Brown*, ¶ VII.

(x) *Allegations of fraudulent concealment*: First and Second *Moitie*, ¶ X; Second *Brown*, ¶ X, First *Brown*, ¶ VIII.

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* No "effects" were alleged in the First *Brown* Complaint, but this allegation in Second *Brown* is essentially a verbatim copy of the "effects" paragraph in First *Moitie* which was in turn a verbatim copy of the "effects" paragraph in the government's complaint. *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858 RHS, Complaint ¶ VI. While there were three "effects" alleged in the government complaint and First *Moitie* (subparagraphs a, b & c), only the first two of these are copied in Second *Moitie* and *Brown*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576-SW

MARILYN MOITIE, Individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NO. C-77-0577-SW

FLOYD R. BROWN, Individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS (RES JUDICATA)

(Filed May 16, 1977)

Preliminary Statement

These cases were filed in the courts of the State of California (Municipal Court of California, County of Santa Clara, Palo Alto-Mountainview Judicial District) in February

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1977. The *Moitie* complaint is verified; the *Brown* complaint is not. These cases urged four peculiarly state law causes of action. Defendants were served with process thereafter. On March 21, 1977, Defendants jointly removed these causes from said California state courts to this Honorable Court. On April 21, 1977, Plaintiffs filed and served their MOTION TO REMAND these cases from whence they were removed. Defendants have not, as yet, replied to that MOTION. Plaintiffs said MOTION unequivocally shows that Defendants' REMOVAL was improvidently undertaken by them. Thus, it will be seen that this Honorable Court, a court of limited jurisdiction, has no jurisdiction over the within causes; therefore, the present MOTION TO DISMISS is not properly before this Honorable Court. Nevertheless, and solely out of an abundance of caution, Plaintiffs hereby respond to Defendants' pending MOTION TO DISMISS (*Res Judicata*), while continuing to contest jurisdictional issues.

These cases were filed in the wake of the dismissal of the complaints in those consolidated cases citable as *Weinberg, et al.* v. *Federated Dep't. Stores, et al.*, Civil No. C-76-867-SW; which cases included the prior *Moitie* and *Brown* complaints. Those cases were dismissed "in their entirety" by this Court by Order filed January 11, 1977. The dismissal of those complaints was not "with prejudice," since such a Draconian dismissal order would be in notable contravention to both the letter and the spirit of the Federal Rules of Civil Procedure. Nor were those dismissals without leave to amend the complaints; neither was a bill of peace issued by the Court so as to preclude the filing of another complaint in a more desirable forum. In sum, confronted with an effectively insuperable barrier (time expended in appeals), Plaintiffs elected to recover sums wrongfully extracted from them, pursuant to a joint scheme engaged in by these Defendants, by whatever proper legal avenue was available to them. The laws of the state of their residence, and where these Defendants defrauded them provide such a remedy.

II

Summary Of Defendants' Argument

Defendants precociously move, per Federal Rule of Civil Procedure 12(b)(6), 28 U.S.C., for a dismissal of these two class-based suits because these Plaintiffs refused to rise to the bait of engaging in protracted appeals in lieu of seeking speedy compensation for the wrongs done them by these Defendants. In so doing, the Defendants impudently urge that it is the Plaintiffs who seek to "trifle" (Defendants' MEMO,p.2,line 24) with the jurisdiction of this Court, when, as will be seen, this Court and *all* the litigants are once again being burdened with a dilatory and baseless motion brought by these Defendants.

Defendants urge two apparent bases for their contention that Plaintiffs HAVE HAD THEIR FAIR DAY IN COURT: *Res Judicata* and "splitting,"

The *res judicata* argument rests upon the fallacy that Plaintiffs' prior complaints were dismissed "with prejudice" and on their underlying merits although the Court (properly) did not so denote the dismissals of the prior complaints. Defendants further urge that the GAMESMANSHIP theory of litigation is alive and well in this Honorable Court, and that Plaintiffs must necessarily allege all possible theories of recovery in their initial pleading or forever be damned.

The "splitting" rubric proceeds from the same fallacy: that Plaintiffs have had a fair opportunity to litigate all their possible claims against those who engaged in a long-term conspiracy "aimed" directly at them, and are, therefore, forever barred from recovery.

Defendants cite many cases as dispositive of their argument. A close reading of those cases, coupled with a common sense recognition of their purport, makes plain that the controlling logic of those cases is inapposite in these premises.

Defendants place much reliance for their fallacious propositions in *Schmieder* v. *Hall* (2d Cir. 1976), 545 F.2d 768. Much as do their other cases, *Schmieder, supra.*, illustrates

that in dismissing that line of cases those courts are eliminating causes that (1) have been in court long enough to try their patience; (2) many of those cases had pleadings which had been repeatedly amended; (3) many of those cases had been afforded an actual trial on the merits at a time precedent; and/or (4) were cases alleging "unfavorable" causes of action (*viz*: libel); and/or (5) demonstrated from both the original and/or amended pleadings that *no facts* were alleged that would allow those plaintiffs recovery on their cause whatever (further) amended pleadings were permitted. None of those situations obtain in the cases at bar.

Schmieder, supra., illustrates that those cases are clearly inapplicable to the facts of these cases. *Schmieder* had been in court since 1969. The Second Circuit opinion was rendered in 1976. Many years (and opportunities) had passed. The district court opinion to which the Court of Appeals' attention was drawn by that appeal had been on the merits of the dispute. The Second Circuit, in that opinion, merely refused to hear more issues in a 40-year long dispute; which issues had not by then been presented.

Likewise, *Angel* v. *Bullington* (1947), 330 U.S. 183, 67 S.Ct.657. *Angel* was a deficiency judgment case, with a long history of pendency in both state and federal courts, and principally presented the question of access to the federal courts. It, too, is inapposite herein.

Defendants then cite the venerable *Williamson* v. *Columbia Gas & Electric Corp.* (3d Cir. 1950), 186 F.2d 464, *cert.den.* (1951) 341 U.S. 921. In that suit, plaintiff had previously amended his complaint, and had two identical suits simultaneously pending in the same court. That court specifically found that those plaintiffs had had their day in court, and could not prevail. These Plaintiffs have had no such opportunity; all they have presented is the question of whether they have standing under the federal antitrust laws.

The rational of the *Williamson* decision, *supra.*, is set forth at pages 469-470 thereof, and illustrates points material

to the issue at bar, first, that courts are to bend over backwards to allow a litigant their fair, not gamesmanlike, opportunity to be heard on the *substance* of any well-founded cause of action; second, that the common sense, as opposed to the hypertechnical (AKA: abandoned) view of matters in suit will prevail in a court rendering an opinion which would deny a litigant their Constitutionally conferred fair day in court on the substance of their claim.

The *Williamson* court found, in relevant portion, as follows: that plaintiff's claim, which had been the subject of prior amended pleadings, was *totally barred* (by laches and the statute of limitations) on any theory of recovery; thus the bar of *res judicata* was a proper bar to the second identical cause. That court held "[t]he instant case presents an excellent example of one of the things these rules were designed to avoid." *Id.* That is, a cause of action, previously extensively litigated and dismissed as barred by the statute of limitations, is a proper subject for disposition by summary means. The cases at bar are chargeable with no such disability. Nor has a hearing on standing under the antitrust laws provided Plaintiffs with their fair day in court on the merits of their factual contentions. The Defendants in the consolidated *Weinberg* predecessor cases nowhere urged that they were immune from suit on any theory, they argued only that their activity was not susceptible of recovery by noncommercial purchasers under the antitrust laws. Moreover, this Honorable Court limited its ruling to the proposition that such claimants "lack standing to maintain an antitrust action for their injuries." (Dismissal Order, p.9, lines 12,13.) Perforce, this court did not dismiss the causes "with prejudice" to any recovery at all. To have done so would have defied "[t]he principle which pervades the modern systems of pleading, especially the federal system, as exemplified by . . . liberal amendment . . . is that the whole controversy may and often must be brought before the same court in the same action," *Williamson, supra.*, 186 F.2d at p. 470. In the cases at bar, Plaintiffs elected to remain in the state forum after being ejected from

the federal courts. The only efficient and logical means to do so was by going back to the chosen forum with state law theories of recovery as they had initially (in *Moitie*) done. This Plaintiffs have done. They are *still* trying to get their fair day in court. *Williamson* had his; we want ours. These Plaintiffs have, as representative parties, elected to pursue recovery of sums wrongfully extracted from them pursuant to a long-term civil conspiracy knowingly engaged in by Movants, rather than to attempt to vindicate any particular theory of the case (i.e., that these are, in fact, antitrust cases when the trial court has ruled they are not). For these Plaintiffs to have done otherwise would have been imprudent. Whatever the eventual outcome of the plurality of appeals which are certain to occur in *Weinberg*, year upon year will lapse, and these parties' claims will go uncollected upon. By the instant means the policy of speedily litigating the *merits* of disputes will be best vindicated.

It is well to note that the original dismissal herein included *Moitie*, a removed California Cartwright Act suit, but the Court made no specific decision regarding that law. Indeed, a recent California state court decision, among others, makes plain that California consumers have standing thereunder. See, *e.g.*, *Rosack* v. *Volvo*, Ca.Superior Ct., San Mateo County, 1977 C.C.H. Trade Cases, ¶ 61,395. Thus it is not clear whether this court properly dismissed *Moitie*, at all.

Defendants' next forward *Hall* v. *Tower Land & Investment Co.* (5th Cir. 1975), 512 F.2d 481. In *Hall*, there was a specific finding of jurisdiction in the district court. In *Moitie/Brown*, this Court found itself without subject matter jurisdiction. There were a plurality of complaints through which Plaintiff could have urged any causes she had. The Fifth Circuit found that, from the *facts* alleged, no recovery on either complaint was possible.

Then comes *Glick* v. *Ballentine Produce, Inc.* (8th Cir. 1968), 397 F.2d 590. *Glick* was a wrongful death action. After motions, plaintiff was given leave to amend his complaint; which he did not do. The case was then dismissed "with pre-

judice." The district court then issued a "mandate" (i.e., a bill of peace). Plaintiff refiled anyway. None of these factors are present in the cases at bar.

Arrowsmith v. *U.P.I.* (2d Cir. 1963), 320 F.2d 219, is also relied upon by Defendants. That case involved an "unfavored" cause of action; the complaint was repeatedly found *substantively* faulty (*i.e.*, there were no allegations therein of "reputation," "publication," nor of any special damages). Mr. Arrowsmith's grievance was allegedly being characterized as a financier for the U. S. Nazis. The *Moitie/Brown* causes competently state their real-world grievances at being cheated of money, in transactions well-known to this Honorable Court; for which these Defendants have been indicted, and plead the defense *nolo contendere* (*i.e.*, I didn't do it, and I'll never do it again), and now seek to avoid liability therefor by, among others, the present means. Their argument consistently ignores an important factor, that the present Plaintiffs were confronted by an unpredictable ruling of law re their antitrust law standing, as the plaintiffs in the cases cited by Defendants were not. Simple equity, and the Federal Rules of Civil Procedure dictate that a plaintiff be given his FAIR DAY IN COURT ON THE MERITS OF THE DISPUTE. The Plaintiffs in the case at the bar have had no such fair opportunity under the circumstances of the present cases.

Defendants' next buttress their argument with *Bartsch* v. *Chamberlin Co. of America* (6th Cir. 1959), 266 F.2d 357. *Bartsch*, a wrongful death action, had been previously dismissed after protracted proceedings, was dismissed with prejudice "at plaintiff's costs" (*Bartsch* at p.358). The *res judicata* motion ruled upon by the Sixth Circuit was directed at a virtually identical cause of action as had been previously dismissed *with prejudice* as being not susceptible of proof, at all.

Defendants then rely upon *Preston* v. *Kaw Pipe Line Co.* (10th Cir. 1942), 128 F.2d 162, *cert.den.* (1942), 317 U.S. 674. *Preston* was a cause for specific performance, and accounting, and for damages allegedly flowing from oil drilling leases.

The plaintiff in that case argued that the adverse ruling in the prior case had been on non-merits issues; thus the previous dismissal of his claim should not operate as a bar to his subsequent suit. The Tenth Circuit, however, pointed out ". . . that was not the case in the former trial of this action. The motions to dismiss were not sustained on account of defects in pleadings, but because appellant *had lost the right to maintain his action* . . ." because of the statutory bars of the statute of limitations and laches. The trial court was held to have done "more than enter an order dismissing the complaint. It entered a judgment against the [p]laintiff and in favor of the defendants on the merits." (Emphasis supplied) *Preston, supra.*, 128 F.2d at pp.164-65.

Defendants next grasp at *Schram* v. *Poole* (9th Cir. 1940), 111 F.2d 725. Rather than belabor the above-discussed points, *Schram* was an attempt to create a cause of action against some of the shareholders of a defunct Michigan bank by its Receiver. The prior suit had been dismissed *with prejudice* by the district court for its *inability* to state a cause of action. *Schram, supra.*, 111 F.2d at p.726. The second suit followed the dismissal with prejudice and a prior appeal to the Ninth Circuit affirming the dismissal in the first instance.

Reliance is next placed by Movants on *Wight* v. *Montana-Dakota Utilities Co.* (9th Cir. 1962), 299 F.2d 470, *cert.den.* (1963), 371 U.S. 962. *Wight* was another case urging a "disfavored" cause of action: malicious prosecution. The case's underlying theory was, politely, arcane. The case was replete with statute of limitations problems; no filing fee had been paid, and ancillary problems attendant the ostensible theory of the case proper. There had been *two* prior dismissals, expressly "with prejudice" and without leave to amend. These dismissals were on Summary Judgment; which, per Federal Rule of Civil Procedure 56 contains adequate safeguards insofar as providing a fair opportunity for a litigant to present his meritorious *contentions of fact.*

The Ninth Circuit opinion relied upon by Movants was addressing appellant's contention that there was no applicable

res judicata bar in that the *appellate* court had not ruled on the underlying factual "merits" of his claim, as well as not addressing other statute of limitations and (legal) summary judgment issues. That the holding of *Wight* is inapposite, as cited by Defendants, is plain. In fact, what is demonstrated by this opinion is the lengths courts will go to so as to allow a litigant their fair day in court.

Defendants assert that *Papilsky* v. *Berndt* (2nd Cir. 1972), 466 F.2d 251, *cert.den.* (1972), 409 U.S. 1077, supports their position that the instant Plaintiffs have already had their fair day in court, and are now forever barred from recovery, based upon a prior ruling to the effect that noncommercial purchasers have no standing to prosecute a retail price fixing action under the antitrust laws. Rather, *Papilsky, supra.*, was the Second Circuit affirming the district court's *denial* of a defendant's *res judicata* motion in a class-based stockholder's suit. The previous class based stockholder's action had been dismissed for failure to prosecute. The *Papilsky* court held that non-party class members were not subsequently barred. Why? The merits of the dispute had never been decided.

In *Baltimore Steamship Company* v. *Phillips* (1927), 274 U.S. 316, 47 S.Ct. 600, also relied upon in these premises by Defendants, *a trial on the merits* of this maritime claim had already been had. Judgment on the merits had then been entered. *Baltimore, supra.*, 274 U.S. at p.318, 47 S.Ct. at p.601. Once again, in that situation a *res judicata* motion, at the point in time therein in question, was cogent. For the same reason, a *res judicata* motion lacks cogency in the cases at bar.

Norman Tobacco & Candy Co., Inc. v. *Gillette Safety Razor Co.* (5th Cir. 1961), 295 F.2d 362, also relied upon by Movants for their fallacious argument that Plaintiffs, having already had their fair day in court, are now to be barred from recovery unless the Ninth Circuit and/or U.S. Supreme Court overrule this Honorable Court in *Weinberg, supra. Norman Tobacco, supra.*, deserves the close attention of this Honorable Court; especially in light of Defendants contention

in the present motion that *Norman Tobacco, supra.*, "closely parallel[s] the situation by the present Plaintiffs *duplicative actions.*" *(Defendants'* MEMORANDUM, p.14,line 5, *et seq.*) This Fifth Circuit opinion was considering the application of the *res judicata* bar with the stated circumstances which obtained in that case. Those circumstances were "a series of complaints, amended complaints, motions to dismiss and the Summary Judgment," *Norman Tobacco, supra.*, 295 F.2d at p.363. More importantly, the Fifth Circuit based its opinion on an identical prior suit "which resulted in a [jury] verdict" in favor of the parties urging *res judicata* as a bar to the subsequent action. *Norman Tobacco, supra.*, 295 F.2d at p.363. Indeed, one of the reasons the prior judgment was entered was the bar to the action of the Alabama statute of limitations. *Id.* None of those factors are present in the cases at bar. That court, setting forth its rationale in rendering its said ruling adopted the following language of *Bennett, et al.* v. *Commissioner of Internal Revenue* (5th Cir. 1940), 113 F.2d 837:

> "This court a number of years ago, Bennett, et al. v. Commissioner of Internal Revenue, 5 Cir., 1940, 113 F.2d 837, 839-840, expounded the fundamental principles of res judicata:
>
> > " 'Res judicata is a principle of peace. Under its influence an end is put to controversies. Parties and their privies are made to abide definitive and final judgments and litigations are concluded.
> >
> > " '*Res judicata rests on a rule of public policy designed to put an end to mere contentious litigations.* Under that rule an issue once finally settled by the judgment of a court of competent jurisdiction, remains settled. "Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest; *and that matters once tried shall be considered forever settled as between the parties.*" ' " (Emphasis supplied.) (Footnote omitted.)

The *Moitie* and *Brown* cases simply have not had the opportunities of those litigants; nor are the present cases "mere contentious litigations" (*Id.*); neither has there been any "trial," *Id.* or a fair opportunity therefor for the present litigants.

Nor has Defendants' reliance on *Engelhardt* v. *Bell & Howell Co.* (8th Cir. 1964), 327 F.2d 30, been better founded. As Defendants concede in their MEMORANDUM (at p.14, lines 24, *et seq.*) the Eighth Circuit was getting rid of a *fourth* attempt to litigate the same claim. Two of those cases had been previously *voluntarily* dismissed by plaintiff pursuant to Federal Rule of Civil Procedure 41(a); the latter dismissal necessarily being per Federal Rule of Civil Procedure 41(a)(2). It was the Rule 41(a)(2) basis utilized, in part, to bar the fourth "day in court." *Engelhardt, supra.*, at p.31. Federal Rule of Civil Procedure 41(a)(2) provides, in relevant subpart:

> "(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court, and upon such terms and conditions as the court deems proper . . ."

Likewise relied upon is *McCarthy* v. *Noren* (9th Cir. 1967), 370 F.2d 845, *cert.den.* (1967), 387 U.S. 917, a real property action, there had been a prior trial on the merits by the court; and there had been an amended complaint. The Ninth Circuit was also discussing its ruling in terms of two final judgments. Once again, the case is patently inapposite under the circumstances of the cases at bar.

Small Business Administration v. *Taubman* (9th Cir. 1972), 459 F.2d 991, also urged as pertinent authority in point, illustrates the paucity of arguments that the doctrine of *res judicata* is applicable to the case at bar. Counter-plaintiff Taubman was apparently a "crank." The case-in-chief was against him by the Small Business Administration on a note. In that matter, a Summary Judgment, with its attendant safeguards as to case's merits, was entered on behalf of the

plaintiff (SBA). *Small Business Administration, supra.*, 459 F.2d at p.992. Counter-plaintiff to urge arcane theories of the case (i.e., joint venture v. conspiracy; individual claimants v. corporate claimants; etc.) on his counterclaims, was found to be unable to prevail, and was dismissed.

Again, Defendants misplace their reliance on a case: *Johnson* v. *Dept. of Water & Power, Los Angeles* (9th Cir. 1971), 450 F.2d 294 *cert.den.* (1972), 405 U.S. 1072. *Johnson* had been around for a while. It had been through the State of California's administrative and judicial redress of grievance systems, and had been the subject of three prior actions; one of which had been voluntarily dismissed. The *Johnson* court found *res judicata* applicable. It also found that plaintiff had no possible cause of action on the facts stated. No such situation or history of the case is present in the cases at bar.

Similarly relied upon by Defendants is *Scoggin* v. *Schrunk* (9th Cir. 1975), 522 F.2d 436, *cert.den.* (1976), 423 U.S. 1066. This case also illustrates the pertinent thread running through the line of case authority cited by Defendants in support of their form over content motion, herein at bar: All those litigants had been in court for demonstrably longer periods of time than merely for a motion directed at standing. Those *res judicata* motions were, *a fortiori*, directed at a case record with substance, as these Plaintiffs have not yet had the opportunity to develop.

Scoggin, supra., was a real property case, where the plaintiff, Mrs. Scoggin, following a forfeiture after not paying a bonded improvement assessment. She had, and won, a trial on the merits of her contentions in the state trial court. She lost that verdict on appeal. She *then* filed a cause alleging "constitutional" violations. *Scoggin, supra.*, 522 F.2d at p.437. It was the later federal cause which was the subject of dismissal on *res judicata* grounds.

III

Plaintiffs' Argument

At the outset, it is necessary to refer to the MEMORANDUM ORDER dismissing the other complaints which Defendants find dispositive of claims against them *in toto*. Next, we are obliged to refer to the Federal Rules of Civil Procedure, and interpretive law in point, California as well as federal.

A. The memorandum order dismissing the prior complaints was limited to the issue of antitrust standing and did not consider the substantive merits of these plaintiffs' claims

Defendants, by their present motion, are engaged in an attempt to turn this Honorable Court's ruling re antitrust standing on its head. Even a cursory good faith reading of the Memorandum Order of this Honorable Court dated January 11, 1977, dismissing prior like suits by these Plaintiffs clearly demonstrates the point. That order was limited to the question of standing to maintain an antitrust action. (Order, p.3, lines 18, *et seq.*) The opinion then goes on to discuss, not issues of the merits of the contentions in suit, but, rather the law of antitrust standing. (Order, p.3, lines 28, *et seq.*; *and see*, Order, p.9, lines 12, *et seq.*; p.10, lines 17, *et seq.*)

This Honorable Court then expressed its frustration with the new *proposition* re recovery under the *antitrust* laws (only). *See, generally*, Order, pp.11-12. There was the plain recognition that the private retail purchaser has inadequate remedies under the antitrust laws. (*Id.*) Very well, these Plaintiffs have gone to the state courts for their recovery on altogether different theories of recovery.

Those theories are contained in the verified complaint in *Moitie*, and the complaint in *Brown*, and are: fraud and deceit; unfair business practices; civil conspiracy; and restitution. Defendants feel sufficient confidence in their apparent impunity that they grow ever more bold. For example, on page 19 of their said MEMORANDUM, Defendants ignore the

presence of the scope of California law allowing recovery for conspiratorial activity, among other matters. They casually urge upon the same Court which made the prior ruling that this Honorable Court has finally disposed of the restitution and unfair business practice causes in its prior dismissal order. This Honorable Court made no such ruling. No such issue was before it. Surely, this Honorable Court did not intend to throw the baby out with the bath water, as Defendants suggest. Certainly, it did not intend to so dismiss without an opportunity to amend. To have done so would violate the duty of this Court.

In like vein, Defendants urge *Wulfjen* v. *Dolton*, 24 C.2d 891 (1944), as dispositive. Once again, the history of that case, set forth in the very first pages of that opinion, make plain the probity of Defendants' assertions in the present motion. In fact, for *res judicata* to apply, a final decision on the merits, or a fair opportunity to present them, must specifically be found. Likewise, for "splitting" logic to apply. The *Ford Motor Co.* v. *Superior Court*, 35 C.A.3d 676, 110 C.Rptr. 59 (1973), case cited as "closely analogous to those presented in the cases at bar" (Defendant MEMORANDUM, p.22 lines 5, *et seq.*), involved a second suit following a *directed verdict at trial*; which verdict was sustained on appeal. Thus, by their own case law citations, Defendants point out the central flaw in their fallacy: *all* those cases' (re splitting and *res judicata*) rulings followed a claimant's extensive longevity in a court of law, much pleading activity, as well as the oft-present absolute lack of cause of action, or, in the alternative, an eleventh-hour attempt to assert an alternative ground for recovery. Rule 15 was never intended to aid such situations, *Foman* v. *Davis* (1962), 371 U.S. 178, 182, 83 S.Ct. 227. Rules 1 and 8(f) of the Federal Rules of Civil Procedure, 28 U.S.C., providing, respectively, for rulings which "shall be construed to secure the just, speedy, and inexpensive determination of every action," and pleadings are to be "construed so as to do substantial justice." *Id.* Moreover, Rule 61 states in unmistakable terms that non-prejudicial error must be disregarded. Federal Rules of Civil Procedure 61, 28 U.S.C.

Trials are speedier than appeals going to such peripheral issues as the proper theory of the case. It is unjust to allow wrongdoers to retain ill-gotten gains for one moment longer than due process of law requires. This procedure also avoids year upon year of appeals before beginning the recovery process, at all.

Defendants have urged an unjust, inexpedient and expensive alternative. This Honorable Court must reject it.

B. The memorandum order dismissing the prior complaints was not a final order; thus, the threshold requirement of *res judicata* is not present and Defendants' motion must, therefore, fail

Reference is again made to the Memorandum Order dismissing the prior complaints. Defendants have seized upon one phase "in its entirety" in that 13-page document as the fundament for their present motion. (Order, p.13,line11.) Defendants urge that this isolated phase demonstrates the intention of this Honorable Court to exonerate these malefactors *in toto*. This necessarily so, because the plaintiffs now in the Ninth Circuit would be unable to amend their complaints if this Honorable Court were to follow their guidance; they, as would we all, be bound for all time by the theory of the case's first pleading. Moreover, should plaintiffs' pending appeals in those cases be unsuccessful, they would be barred from amending. Is this result speedy? Inexpensive? More importantly, is it just? "Where wrong has been done and where the consequences of not fashioning a remedy would permit avoidance of appropriate sanctions and the retention of illegal profits" (*Eisen, et al.* v. *Carlisle & Jacquelin, et al.* (D.C. N.Y. 1971), 52 F.R.D. 253, 264), a court cannot sit idly by and allow Defendants to escape liability with sophistries.

Again, by reference to said Order, it is plain that the dismissal for lack of antitrust standing was not "with prejudice." No such language is therein present. Defendants were

awarded no costs. Plaintiffs were not "mandated" not to sue further. No releases or the like have been entered into. The decision, by its own terms, was limited to antitrust standing. No discussion of overall maintainability of those actions was had, nor was such referred to. Such issues were not being considered. *See, i.e.*, Order, p.4, lines 28, *et seq.*, "[a]nd the meaning of that phrase is the sole issue presented in this motion to dismiss."

C. Reference to blackletter law makes evident that the said decision was not "on the merits"

In the first instance, California law is herein applicable for two reasons: this is a diversity case, and second, this Court has no jurisdiction over these cases, and, when remanded, this motion will be decided by state law of the forum. In any event, blackletter federal law in point also sustains the continued vitality of these suits.

Defendants cited *Angel* v. *Bullington* (1947), 330 U.S. 183, 67 S.Ct. 65. That case also stands for the proposition that, in a diversity case, a federal court is merely another court of the forum state and must apply its law. *Angel, supra.*, 330 U.S. at p.187.

The applicable California blackletter law is set forth in *4 B. Witkin, California Procedure*, 2d Ed. (1971), "Judgement," §§168, *et seq.*:

> "A final judgment is *res judicata* only if it was rendered on the merits. This requirement is derived from the fundamental policy of the doctrine, which gives stability to judgments after the parties have had a fair opportunity to litigate their claims and defenses. (See Rest., Judgements §§1, 45 *et seq.*; *Goddard* v. *Sec. Title I. & G. Co.* (1939) 14 C.2d 47, 51, 92 P.2d 804; *Datta* v. *Staab* (1959) 173 C.A.2d 613,620, 343 P.2d 977, quoting the text; James, p.573; 46 Am.Jur.2d 640; 65 Harv.L.Rev. 835; *supra*, §147.)

"The judgment is on the merits if the substance of the claim is tried and determined, no matter how wrongly it is decided. In other words, a judgement is binding and conclusive against collateral attack though it is harsh and unjust, contrary to the evidence, or based on errors of law. (See Rest., Judgements §1, Comment b; 46 Am. Jur.2d 642; *Jurisdiction*, §180; but see *supra*, §150.) The rule, however, does not produce a fixed classification of judgments which are or are not on the merits; it is often necessary to examine the record of the proceedings to determine whether a particular adjudication is to be considered *res judicata*. (See *supra*, §152; *infra*, §169 *et seq.*)

"The Restatement (§49) offers this broad test of a judgment for the defendant:

"(1) The judgment is on the merits if it is based on the *substantive law*, and determines that the plaintiff has *no cause of action.*

"(2) The judgment is not on the merits if it is based merely on *rules of procedure*, and determines only that the plaintiff is not entitled to recover in a particular action; *e.g.*, dismissal for lack of jurisdiction, or judgment after special demurrer sustained. (See *GMS Properties* v. *Superior Court* (1963) 219 C.A.2d 407,415, 33 C.R. 163 [decision on lack of jurisdiction]; *infra*, §173 *et seq.*)"

Witkin, supra., then goes on to discuss the applicability of the pertinent "Rule and Theory" at Section 173, p.3315, as follows:

"From one point of view the judgment entered after sustaining a demurrer merely determines the insufficiency of the pleading and not the merits of the claim or defense. On the other hand general demurrers are commonly used to decide cases expeditiously on the fundamental questions of law involved (see *Pleading*, §796), and a rule that a judgment on demurrer is never *res judicata* would be unrealistic and unwise. Hence counsel must produce and the court must examine the record in

the prior action to see whether the judgment determined the merits.

" * * *

"But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. . . . *This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action.*" (See also *Keidatz* v. *Albany* (1952) 39 C.2d 826, 828, 249 P.2d 264, *infra*, §174; *Crowley* v. *Modern Faucet Mfg. Co.* (1955 44 C.2d 321, 323, 282 P.2d 33, *infra*, §175; *Lunsford* v. *Kosanke* (1956) 140 C.A.2d 623, 295 P.2d 432, *infra*, §174; *Sterling* v. *Galen* (1966) 272 C.A.2d 178, 182, 51 C.R. 312; 46 Am.Jur.2d 664; Rest., Judgments §49, Comment a; §50; 65 Harv.L.Rev. 836; 30 Cal.L.Rev. 487; Clark, p.530 . . .

" * * *

"[§174] Judgment Not on Merits.

"(a) *Special Demurrer.* No difficulty is encountered with a judgment entered after sustaining a special demurrer for formal defects such as uncertainty, *incapacity to sue*, misjoinder of parties or causes, etc, *or for* lack of jurisdiction. It is *not res judicata.* (See *Goddard* v. *Security Title I. & G. Co.* (1939) 14 C.2d 47,52, 92 P.2d 804; *Johnston* v. *Ota* (1941) 43 C.A.2d 94,97, 110 P.2d 507; Rest., Judgments §§49, 50; 46 Am.Jur.2d 656, 662, 668.)

"(b) *General Demurrer.* In the *Goddard* case, *supra*, a federal district court sustained a general demurrer and the judgment against the plaintiff was affirmed by the court of appeals. In the new action the record was examined,

and it appeared from the minute order of the trial judge and the opinion of the appellate court that the fatal defect was in *the form of the action* — the complaint was framed on a theory of conversion rather than case. *Held*, 'The judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, *in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits*. Such a judgment is clearly not on the merits, and under the rules set forth above, is not *res judicata*.' (14 C.2d 53.)

"In *Keidatz* v. *Albany* (1952) 39 C.2d 826, 249 P.2d 264, the first action, to rescind a land contract for fraud, was dismissed after a general demurrer was sustained on the ground of laches. The first complaint did not sufficiently state facts to justify the alternative recovery of damages, and a second action was brought in which this defect was overcome. *Held*, the former judgment was not a bar.

"In *Lunsford* v. *Kosanke* (1956) 140 C.A.2d 623, 628, 295 P.2d 432, a contract action, defendant demurred and objected to all evidence. The trial judge ruled that the pleading was insufficient *but also filed findings against plaintiffs on the merits*. Later plaintiff brought a second action with a good complaint. *Held*, the first judgment was *not res judicata. It was not on the merits*, for the judge had held the *complaint* so defective as to preclude the introduction of any evidence under it. *Since the case was decided purely on insufficiency of the pleadings, the purported findings on the merits were improper and void, and could not affect the correct determination of the issue of res judicata. . . .*" (Emphasis supplied.)

That treatise goes on to clarify when a demurrer, which is much like a Federal Rule of Civil Procedure 12(b) motion,

operates to bar a subsequent action between the same parties; when the same underlying factual premises are urged. Section 175 thereof recites:

> "A judgment on general demurrer will be a bar under the above test (*supra*, §173), if (a) the new complaint states the same facts — the former judgment determined that these facts *do not constitute a cause of action*; *or* (b) *though the new complaint states different facts, the demurrer to the first was sustained on a ground equally applicable to the second.* (See *Keidatz* v. *Albany* (1952) 39 C.2d 826,828, 249 P.2d 264 [dictum]; Rest., Judgments §50; 65 Harv.L.Rev.837.)
>
> "(a) *Facts Alleged Substantially the Same.* In *See* v. *Joughin* (1941) 18 C.2d 603, 607, 116 P.2d 777, plaintiff's first action, to set aside a foreclosure judgment for extrinsic fraud, was dismissed after a general demurrer was sustained, and the appellate court held that *no cause of action* to set aside the judgment *or* to declare a trust was stated. The second action alleged the same facts in slightly different language and sought to have a trust declared. *Held*, under the test of the *Goddard* case (*supra*, §173), the first judgment was *res judicata*; the pleadings, when compared, alleged substantially the same case in both instances. (See also *Erganian* v. *Brightman* (1936) 13 C.A.2d 696, 57 P.2d 971; *Morrison* v. *Willhoit* (1944) 62 C.A.2d 830, 839, 145 P.2d 707; *Crowley* v. *Modern Faucet Mfg. Co.* (1955) 44 C.2d 321, 323, 282 P.2d 33; *Chappelle* v. *Concord* (1956) 144 C.A.2d 822, 826, 301 P.2d 968; *In re Cole's Check Service* (1963) 215 C.A.2d 332, 337, 30 C.R. 306; *Sterling* v. *Galen* (1966) 242 C.A.2d 178, 182, 51 C.R. 312.)
>
> "(b) *Ground Equally Applicable.* In *Olwell* v. *Hopkins* (1946) 28 C.2d 147, 150, 168 P.2d 972, the demurrer set up invalidity of the contract on which the action was brought. The court said: 'The defense thus interposed went to the merits of plaintiffs' cause of action. . . .

> *They raised an issue as to plaintiffs' right to recover under any circumstances upon their alleged cause of action* and upon that issue the court rendered judgment agaist plaintiffs. . . . A decision on the merits . . . is not necessarily a decision upon the facts.' (See also *Chappelle* v. *Concord, supra,* 144 C.A.2d 825 [sovereign immunity].)"(Emphasis supplied.)

Plaintiffs hereby incorporate the discussion of the MEMORANDUM ORDER dismissing those consolidated cases known as *Weinberg, et al., supra.,* among which were the present cases. The same text, in Section 179, at page 3320, goes on to discuss the presence and effect of recitals in prior orders dismissing complaints when those orders are urged as a *res judicata* bar to subsequent complaints. It is to be noted that blackletter law is extensively reproduced in this ARGUMENT to illustrate the Movants' total lack of good faith in bringing the present MOTION TO DISMISS (*Res Judicata*), as if the preceding analysis of cases urged by Defendants does not amply so illustrate. Plaintiffs are, as in the MOTION TO REMAND now pending, entitled to costs and attorney's fees herein.

It is to be noted that this litigation has been pending for approximately one year without a single matter of substance having transpired. The evidence in these cases is becoming "cold"; yet we continue to be involved in purely dilatory motions, having no relation whatever to the *fact* that these Defendants have defrauded a large number of members of the public.

Section 179, p.3320, of *Witkin, supra.*, instructs:

> "Does the court which renders judgment have the power to characterize it as final and on the merits, *e.g.*, by use of the words "with prejudice," and thereby preclude any inquiry by the second court into its conclusive effect? The answer to this question is not easy, and calls for several disctinctions.
>
> "*First*, apart from statute, the determination of the issue of *res judicata* is for the second court. The court

rendering the judgment cannot by recital make it *final* if it is only interlocutory in effect. (See *supra*, §1 *et seq.*) Similarly the court's expression of its own intent or belief that the *merits* have been decided is not binding on the court in which the judgment is pleaded. In *Goddard* v. *Security T.I.&G.Co.* (1939) 14 C.2d 47,54, 92 P.2d 804, *supra*, §174, the federal district court sustained a general demurrer and dismissed the action 'with prejudice.' The California court, holding that a new action was not barred, said: '[I]f the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of *res judicata* would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of proposed order drafted by successful counsel . . . it is the nature of the action and the character of the judgment that determines whether it is *res judicata*. The intention of the court to make a determination *on the merits* may be important, but if the judgment is clearly not on the merits, the court's intention to make it a *bar* is immaterial. The words "with prejudice" add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court.' (See also *Ensher* v. *Ensher* (1960) 187 C.A.2d 407,411, 9 C.R. 732; cf. *Lunsford* v. *Kosanke* (1956)140 C.A.2d 623, 295 P.2d 432, *supra*, §174.)

" * * *"

Defendants' urgings on the alleged "splitting" of Plaintiffs' various causes of action fail for the same, again, blackletter, reasons. *B. Witkin, supra.*, §189, p.3329, *et seq.*, in discussing a "Judgment as Merger or Bar," first discusses *res judicata*/splitting bars arising from the merger of a claim in a judgment for Plaintiff, as follows:

"[§189] General Rule.

"A valid *final* judgment in favor of the plaintiff *merges* the claim in the judgment. The cause of action is extinguished and the only remaining right of action is on the judgment. (See Rest., Judgments §§45(a),47, 61 *et seq.*; 65 Harv.L. Rev. 824; 40 Cal.L.Rev. 412; James, p.549 *et seq.*; 46 AmJur.2d 551 *et seq.*)

"The chief application of the merger aspect of the *res judicata* doctrine is in the situation where the plaintiff obtains a money judgment for a wrong and later, on a showing of additional elements of damage or a different legal theory of wrong, seeks *a further recovery*. If the cause of action is single, he cannot split it and obtain successive judgments for parts of the wrong. The first judgment will merge and extinguish the cause of action for any and all relief properly obtainable in the first action. (See Rest., Judgments §45.) Equitable decrees, calling for an act other than payment of money, are distinguishable: No action at law can be brought on the decree itself, and there is therefore no merger of the cause of action in the judgment. (See Rest., Judgments §46, Comment a; §47, Comment h; 46 AmJur.2d 554.)" (Emphasis supplied.)

" * * *"

Witkin, supra., §192, at p.3332, then instructs on the effect of:

"2. Judgment for Defendant as Bar

"(a) [§192] General Rule.

"The same kind of *valid final judgment* that would merge the plaintiff's cause of action (see *supra*, §189) will, if in favor of defendant, constitute a bar to any further suit by the plaintiff on the same cause of action. (See Rest., Judgments §§45(b), 46,48, 61 *et seq.*; *Panos* v. *Great Western Pack. Co.* (1943) 21 C.2d 636, 134 P.2d 242; *Olwell* v. *Hopkins* (1946) 28 C.2d 147,152, 168 P.2d 972; *Bendlage* v. *Kohlsaat* (1942) 54 C.A.2d 130,133 98

P.2d 1027; *Babcock* v. *Babcock* (1944) 63 C.A.2d 94, 100, 146 P.2d 279; *Ernsting* v. *United States* (1929) 206 C. 733,736, 276 P. 103; *Stafford* v. *Yerge* (1954) 129 C.A.2d 165,170, 276 P.2d 649; *Williams* v. *Krumsick* (1955) 131 C.A.2d 411,414, 280 P.2d 486; *Weil* v. *Barthel* (1955) 45 C.2d 835,837, 291 P.2d 30; *State Farm etc. Ins. Co.* v. *Salazar* (1957) 155 C.A.2d Supp. 861,864, 318 P.2d 210, citing the text; 65 Harv.L.Rev. 824; 40 Cal.L.Rev. 412; 46 Am.Jur.2d 571; James, p.550.) (Emphasis supplied.)

"* * *"

The ultimate disposition under California law, of the sole issue presently at issue is also set forth in *Witkin*, *supra.*, §193, p.3333:

"(b) [§193] Choice of Wrong Remedy.

"If the plaintiff, with a good cause of action, seeks a remedy to which he is not entitled, or frames his complaint on an erroneous theory so that it lacks essential allegations to justify relief on the proper theory, judgment may be rendered against him. Nevertheless he may sue again on the same cause of action:

"*First*, the doctrine of *election of remedies* does not apply where the plaintiff has misconceived his remedy. (See *Actions*, §125.)

"*Second*, the doctrine of *res judicata* does not apply because the judgment, though final, is not on the merits; recovery was denied not for substantive defects in the plaintiff's claim but for procedural reasons. (See Rest., Judgments §65; 65 Harv.L.Rev. 823; *So. San Bernardino Co.* v. *San Bernardino Nat. Bank* (1899) 127 C. 245,248, 59 P. 699 [prior quiet title suit on erroneous theory that defendant had no title; not a bar to present action to establish trust on theory that defendant has legal title]; *Miller* v. *Ambassador Park Syndicate* (1932) 121 C.A. 92,99 9 P.2d 267; *Goddard* v. *Security Title I & G Co.* (1939) 14 C.2d 47,52, 92 P.2d 804, *supra*, §174; *In re Keck* (1946) 75 C.A.2d 846,849, 171 P.2d 933; 46

> Am.Jur.2d 640.) This is true even though the first court which held the form of action wrong was actually in error; its final judgment on that point is binding under the doctrine of "direct estoppel." (Rest., Judgments §67.)

Defendants have alleged, however, that they are without this controlling logic on the basis of the *Ford* v. *Superior Court* case, hereinbefore discussed, as well as on *Panos* v. *Great Western Packing Co.*, 21 C.2d 637 (1943), for their authority (Defendants' MEMORANDUM, pp. 15,19). In *Panos*, there was a final judgment in the prior suit, and the plaintiff was bound by a stipulation entered into by his attorney, which recited:

> Plaintiff stipulated before the trial court that the accident referred to in this and in the prior action "are one in the same accident," and that the judgment in the prior action *was a judgment on the merits before a court having jurisdiction thereof and that the final judgment had been final. Panos, supra*, 21 C.2d at p.637.

In the cases at bar there has been no such stipulation; indeed Plaintiffs vigorously reject the proposition that anything more than jurisdiction (subject matter jurisdiction) was hereinbefore either at issue or decided by this Honorable Court. Plaintiffs, therefore, plainly have the right to prosecute their pending actions, the prior dismissal of their complaint notwithstanding.

In this regard, *Witkin, supra.*, §209 at pp.3348-3349, is again instructive:

> "4. When Judgment is Not Conclusive.
>
> "(a) [§209] Issue Excluded or Reserved.
>
> "If the parties expressly exclude a particular issue from consideration, or the court expressly refrains from determining it, no collateral estoppel results. (Rest., Judgments §68, Comment f; *Stark* v. *Coker* (1942) 20 C.2d 839, 843, 129 P.2d 390; *Southern Pac. Co.* v.

Edmunds (1914) 168 C. 415, 418, 143 P. 597; *Estate of Hill* (1957) 149 C.A.2d 779, 787, 309 P.2d 39, *Estate of Liddle* (1958) 162 C.A.2d 7, 13, 328 P.2d 35; *Estate of Doyle* (1962) 202 C.A.2d 434, 439, 21 C.R. 123, citing the text; *People* v. *Barenfeld* (1962) 203 C.A.2d 166, 176, 21 C.R. 501; *Hurst* v. *Hurst* (1964) 227 C.A.2d 859, 864, 39 C.R. 162; *Monolith Portland Cement Co.* v. *Mojave Pub. Util. Dist.* (1970) 4 C.A.3d 840, 846, 84 C.R. 639 [parties and court agreed that it was not involved]; *Myers* v. *Orange* (1970) 6 C.A.3d 626, 633, 86 C.R. 198, citing the text; see 46 Am.Jur.2d 588, 589; James, pp. 576, 579.)

" * * * * "

This court did not rule upon the substantive claims underlying the dismissed complaints, and clearly cannot have intended to do so. Yet the MEMORANDUM ORDER, *supra.*, makes no mention of those cases' "merits." Did this Honorable Court, then, reserve such issues? *Witkin, supra.*, Section 210, at pp.3348-9, provides assistance in this regard, as well:

"[§210] Determination Not Essential.

"If a finding or other determination of an issue in the first action was entirely unnecessary to the judgment, it will not have the effect of a collateral estoppel. (*Natural Soda Products Co.* v. *Los Angeles* (1952) 109 C.A.2d 440, 445, 240 P.2d 993; *Chapman* v. *Hughes* (1901) 134 C. 641, 654, 58 P. 298; *Denning* v. *Green* (1931) 119 C.A. 102, 105, 6 P.2d 317; *Green* v. *Green* (1944) 66 C.A.2d 50, 60, 151 P.2d 679; *Albertson* v. *Raboff* (1956) 46 C.2d 375, 385, 295 P.2d 405, citing the text; see Rest., Judgments §68, Comment o; 65 Harv. L.Rev. 846; 46 Am.Jur.2d 593; James, p.582.)"

While the above citation makes reference to "collateral estoppel," that doctrine and *res judicata* are closely related; perhaps it could be said that they are two sides of the same coin. In any event, the applicable logic is herein applicable.

Moreover, the key to the application of either of the foregoing doctrines is both plain and simple, as the *exception* to the application of either doctrine, as set forth in Section 70, Rest., Judgments, Comment f (1948 Supp.), "in any event it is not conclusive if injustice would result." *Also see*, *Louis Stores* v. *Dept. of Alcoholic Beverage Control*, 57 C.2d 749, 757, 22 C.R. 14 (1962); *Thain* v. *Palo Alto*, 207 C.A.2d 173,185, 24 C.R. 515 (1962); *Pacific Maritime Assn.* v. *Calif. Unemp. Appeals Bd.*, 236 C.A.2d 333; *Powers* v. *Floersheim*, 256 C.A.2d 223, 230, 63 C.R. 913 (1967); *United States Fire Ins. Co.* v. *Johansen*, 270 C.A.2d 824,834, 76 C.R. 174 (1969).

D. The application of federal law, should such be done, does not alter the ineluctable conclusion that these cases are not mordant

The two principal blackletter sources for federal practice are *Moore's Federal Practice* (1974 Ed.) and *Wright & Miller, Federal Practice and Procedure* (1971 Ed.) Once again, the meretriciousness of Movants' urgings are thereby illustrated. For example, *1 B Moore, supra*, ¶ 0.409 [1] at p.1003, advises:

> "It has been pointed out that a final termination of an action short of a determination of the merits--as upon a sustained plea of lack of jurisdiction or improper venue — is judicially conclusive, in a subsequent suit, as to the precise matters adjudged, *but* will *not* bar a second suit between the parties or their privies on the same cause of action unless those issues are again decisive, and even if the prior judgment necessitates a dismissal of the second action, the cause of action is still not barred by *res judicata* until there is a final determination on the merits. And 'merits' means 'the real or substantial grounds of action or defense as distinguished from matters of practice, procedure, jurisdiction or form.' *Id.*
>
> " * * * *
>
> "And when a number of grounds for dismissal are urged, an order of the court simply that the cause be dismissed,

without an indication of the ground upon which the court acted, cannot be *res judicata* as to any of the grounds for such order.

"A dismissal without prejudice normally does not determine the merits.

"The procedural law of the forum plays an important role as to the effect of a dismissal." *Moore, supra,* ¶ 0.409[1] at p.1009.

" * * * *

"The procedural law of the forum, that renders the judgment, affects the doctrine of *res judicata* in many other ways, by determining variously questions such as the necessity to assert certain claims as compulsory counterclaims, *the effect of a dismissal,* or of a judgment upon a demurrer or its modern substitute — the motion to dismiss for failure to state a claim for relief. The forum's substantive law also plays an important role.

" * * * * " (Emphasis supplied.) (Footnotes omitted.)

As hereinbefore discussed, the law of the forum dictates the continued vitality of these actions.

Likewise, with *Wright & Miller, supra.*:

"In the light of the Costello decision, courts have recognized that Rule 41(b) does not apply in situations in which a case is dismissed because of some initial bar to reaching the merits of the plaintiff's claims. . . . On a similar principle it has been held that dismissals that do not reach the merits as for want of jurisdiction . . . *must be without* prejudice. *9 Wright & Miller, supra,* Civil §2373 at p.237, and cases cited." (Emphasis supplied) (Footnotes omitted.)

Moreover, that same text instructs:

"[i]f a dismissal is for a defect in the pleadings that does not reach the merits, as is generally true of a dismissal under Rule 12(b)(6), it *is inconsistent with the whole spirit of the rules to regard the dismissal as an adjudication on the merits. Id.* (Emphasis supplied.)

Defendants' prior motion was per Rule 12(b)(6), as is their present motion. The prior dismissal was directed at a nonsubstance matter. It is, therefore, evident that Defendants' present motion "is inconsistent with the whole spirit of the rules. . . ." *Id. And see, Dodd* v. *Spokane County, Washington* (9th Cir. 1968), 393 F.2d 330. *See, generally*, Civil §1375, *5 Wright & Miller, supra.*, for a discussion of Rule 12 dismissals and their effect.

IV

Conclusion

As was pointed out at the outset, this Honorable Court has no jurisdiction over these cases, and this opposition to Defendants' pending MOTION TO DISMISS is filed only out of an abundance of caution.

Should this Court retain jurisdiction over these causes, it would be obliged to apply the law of California, as these would then be diversity cases. If that be the case, this Honorable Court's prior dismissal of previously removed (in *Moitie*) State cases would be subject to the above-discussed California law, and the prior *Brown* complaint also retains its vitality for analagous federal law reasons: a fair day in court on the merits of one's injury is not had on the basis of a standing hearing; especially as when done as hereinbefore set forth.

WHEREFORE, it is prayed that Defendants' pending MOTION TO DISMISS (*Res Judicata*) be denied.

DATED: May 13, 1977.

Respectfully submitted,

LAW OFFICES OF JERROLD N. OFFSTEIN SUMMERHAYS & SWOPE

BY /s/ JERROLD N. OFFSTEIN
Jerrold N. Offstein

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576-SW

MARILYN MOITIE, individually, and on behalf of others similarly situated,

Plaintiffs.

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NO. C-77-0577-SW

FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

REPLY MEMORANDUM OF DEFENDANTS FEDERATED DEPARTMENT STORES, INC. AND SAKS & COMPANY IN SUPPORT OF MOTION TO DISMISS

(Filed May 20, 1977)

I

Introduction

While plaintiffs loudly wail for their "day in court," it is clear that what they really want is another day in another

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court. The plain fact is that plaintiffs studiously avoided the numerous opportunities they had to assert their present legal theories during the pendency of the prior actions before this Court. They could have alleged them in their complaints, and indeed they arguably did so to some extent.[1] They could have sought to amend their complaints, but they did not. They could have urged these theories in their brief and argument in opposition to the prior motion to dismiss, but they did not. They could have moved for rehearing or, as did other plaintiffs, sent a letter to the Court urging reopening of the case to consider these theories, but they did not. Moreover, they could have urged these theories on appeal to the Ninth Circuit, but they did not appeal.

Plaintiffs had more than eight months (May 1976 — January 1977) in this Court to give birth to their present theories. Instead, they held back to see what this Court would do, and when it ruled against them they promptly sought to separate themselves from the other related alleged class actions and seek a different forum. To allow plaintiffs to succeed in their forum-shopping game would do violence to the principles of *res judicata*, denigrate the judgment of this Court and encourage the proliferation of duplicative litigation.

The salutary purposes of *res judicata* are to prevent duplicative litigation and protect the integrity of final judgments. A plaintiff is required "to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and *a fortiori* he cannot divide the grounds of recovery." *United States* v. *California & Oregon Land Co.*, 192 U.S. 355, 358 (1904). In California as well as under federal law, "it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action." *Wulfjen* v.

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[1] See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, pp. 8-9 (hereinafter "Def. Mem.").

Dolton, 24 Cal.2d 891, 895, 151 P.2d 846, 848 (1944). Plaintiffs' actions here fly in the face of these sound policies.

The impropriety of plaintiffs' action is exacerbated by the fact that these are but two of seven essentially identical cases all purporting to be class actions for recovery of the same damages arising out of the same alleged conspiracy. Allowing plaintiffs to proceed here would spawn a multiplicity of duplicative actions over this single claim. Rather than expediting the litigation, as plaintiffs profess to desire, it would complicate and prolong it to the serious detriment of all parties, potential class members and the Courts.

The litigation which originated in this Court to redress the alleged grievances of the purported class of purchasers of women's clothing from defendants is now pending in the Ninth Circuit and will proceed to whatever conclusion is just and appropriate under the applicable law. These plaintiffs have voluntarily chosen to disassociate themselves from this litigation. They cannot be permitted to commence an additional, conflicting litigation over the same matter, either in this Court or in another forum.

II

Argument

A. For the most part, there is no dispute as to the governing principles of *res judicata* and their applicability to the facts presented here

The basic principles of res judicata are well established:

— A final judgment on the merits of a claim absolutely bars further litigation between the same parties on the same claim.

— For *res judicata* purposes, a "claim" inheres in the underlying operative facts and consists of the alleged primary right of the plaintiff and the alleged wrongful act of the defendant.

— *Res judicata* cannot be defeated simply by the assertion of different legal theories in a second suit arising out of the same operative facts.

— *Res judicata* bars subsequent litigation on the same claim "upon any ground whatever" — *i.e.*, " 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' "[2]

In their Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss (hereinafter "Pl. Mem."), plaintiffs do not appear to challenge any of these principles.[3] Nor do they, with but one exception, question the applicability of such principles to the present cases. It is undisputed that:

— These second complaints are suits between the same parties based on the same claim as the first complaints.

— The only difference between these second complaints and their predecessors is that these complaints refer to different legal theories.

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[2] *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

[3] Plaintiffs appear to suggest in their memorandum that *res judicata* applies only to cases with a long litigation history, amended pleadings, "unfavored" legal theories and an actual trial or other determination of the ultimate substantive factual issues. See Pl. Mem. 4, 7, 15. But it is obvious that none of these qualifications has ever been placed on the doctrine, and plaintiffs do not cite a single case or rule which superimposes any of these qualifications on the basic doctrine. Rather, in their extensive quotations from generalized treatise discussions, plaintiffs clearly acknowledge the applicability of the controlling principles stated in the text, *supra*, and more fully in defendants' opening memorandum.

— The theories invoked by plaintiffs one month after dismissal could have been raised during the pendency of the prior proceedings.[4]

— The judgment dismissing the prior actions "in their entirety" was a final judgment of this Court from which the plaintiffs could have appealed but did not do so.

The one "exception" raised by plaintiffs concerning the applicability of *res judicata* herein is their contention that this Court's dismissal of the prior actions was not "on the merits." As shown in the following section and in defendants' opening memorandum, however, plaintiffs' arguments on this point squarely conflict with well established authority. "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits . . . ." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Such a judgment "on the merits" was previously rendered by this Court on the prior, identical claims filed by these plaintiffs.

B. This court's dismissal of the prior actions on the identical claim was a final judgment "on the merits" for purposes of *res judicata*

Plaintiff's contention that the dismissal of their prior complaints by this Court was not a final judgment "on the merits" rests on three patently insubstantial premises: (1) that the Court must explicitly state that the dismissal was "with prejudice"; (ii) that the dismissal was for lack of subject matter jurisdiction; and (iii) that a dismissal for failure to state a claim under Rule 12(b)(6) is not "on the merits." None of these premises will withstand scrutiny.

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[4] Despite the explicit invocation of the California unfair business practices statute in the First *Moitie* Complaint and discussion of the point in defendants' memorandum in support of their motion to dismiss that complaint, plaintiffs argue that this theory was not previously raised. Pl. Mem. 14. Plaintiffs do not dispute, however, that all of their present theories *could* have been raised previously.

1. Use of the phrase "with prejudice" is not essential to judgment on the merits.

Contrary to plaintiffs' apparent suggestion (Pl. Mem. 2, 8, 16), there is no requirement that, for a dismissal to be "on the merits," the Court must pronounce the talismanic phrase "with prejudice." Indeed, the exact opposite is true. Subject only to exceptions not pertinent here, an order dismissing a complaint is deemed to be "with prejudice" unless the Court specifically states the contrary. See *Safeway Stores* v. *Fannan*, 308 F.2d 94, 96 (9th Cir. 1962); Rule 41(b), Fed. R. Civ. P.

2. This Court's prior dismissal order was not based on lack of jurisdiction.

There is no merit to the plaintiffs' assertion that the prior dismissal was for want of subject matter jurisdiction. Pl. Mem. 7, 23. The prior actions were plainly within the subject matter jurisdiction of this Court since they "arose under" the federal antitrust laws. 28 U.S.C. §1337.[5] This Court, exercising such jurisdiction, explicitly ruled on both the prayer for injunctive relief and the prayer for damages.

With respect to the injunctive prayer, there was no dispute that the plaintiffs had standing under Section 16 of the Clayton Act, 15 U.S.C. § 26, since that provision is not limited to persons injured in their "business or property." See *In re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F.2d 122, 130 (9th Cir. 1973), *cert. denied sub nom. Morgan* v. *Automobile Manufacturers Ass'n, Inc.*, 414 U.S. 1045 (1973). The Court held that "the plaintiffs are not, under the circumstances here, faced with irreparable future injury which would entitle them to injunctive relief under section 16." Memorandum Order, pp. 12-13. This Court unquestionably *exercised* jurisdiction in dismissing the prayer for injunctive

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[5] The jurisdictional basis for these and the prior related actions is discussed in defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Remand, pp. 9-10 and Appendix, filed herein on May 13, 1977.

relief by applying the law, as interpreted, to the facts alleged in the complaints.

The same is true of the Court's action regarding the prayer for damages. The Court interpreted the antitrust statute under which plaintiffs' claim arose as requiring a commercial injury (*i.e.*, an injury to "business or property") to support a private damage action, and it applied the law as interpreted to the facts alleged.[6]

It is incontrovertible that the judgment of this Court on the prior complaints (as to both their injunctive and their damages aspects) was a dismissal for failure to state a claim and was *not* a dismissal for want of subject matter jurisdiction. In asserting the contrary, plaintiffs confuse two concepts which were clearly distinguished by the Supreme Court in *Bell* v. *Hood*, *supra*, at 682:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. *For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.* Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." (Emphasis supplied.)

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[6] The Court's Memorandum Opinion did not explicitly discuss the state law arguments raised by some plaintiffs, including Moitie, or the Fifth Amendment contention raised by another plaintiff. But the Court is not required to write an opinion on every issue or argument raised. Defendants had extensively argued that the purported state claims should be treated exactly like the other related federal claims. In their briefs on the motion to dismiss, no plaintiff addressed these arguments.

See also Dexter v. *Equitable Life Assur. Society of U.S.*, 527 F.2d 233, 236-37 (2d Cir. 1975); *Mirin* v. *Taxi Cab Authority of Clark County, Nevada*, 441 F.2d 1123, 1125 (9th Cir. 1971); *Weiss* v. *Los Angeles Broadcasting Co.*, 163 F.2d 313, 314, 316 (9th Cir. 1947).[7]

3. A Rule 12(b) (6) dismissal is a dismissal on the merits.

Plaintiffs' remaining premise, that a motion to dismiss for failure to state a claim under Rule 12(b) (6) is not a judgment "on the merits" for *res judicata* purposes, is equally inconsistent with the foregoing authorities. All of these cases squarely hold that a dismissal for failure to state a claim is a final judgment "on the merits." *See also Exchange Nat. Bank of Chicago* v. *Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976) ("judgments under Rule 12(b) (6) are on the merits with *res judicata* effects . . . .").

This was made particularly clear in the Ninth Circuit's *Mirin* case. In the decision cited above, the Court of Appeals, applying Rule 12(b)(6), affirmed the District Court's dismissal of an action brought by certain taxi owners to enjoin a state taxi ownership allocation plan on the theory that the plan contravened the plaintiffs' Fifth and Fourteenth Amendment rights. Shortly thereafter, the same plaintiffs filed another suit in the District Court raising essentially the same claims. On appeal from dismissal of the second suit on grounds of *res judicata*, plaintiffs argued that the prior action was not "on the merits." The Ninth Circuit flatly rejected this assertion. *Mirin* v. *Nevada ex rel. Public Service Comm'n*, 547 F.2d 91 (9th Cir. 1976) ("*Mirin II*"). Noting its holding in *Mirin I*

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[7] The relevant portions of these opinions are set out in the Appendix to defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion to Remand, filed herein on May 13, 1977.

that the complaint should be dismissed for failure to state a claim upon which relief could be granted, the Court held:

> "We conclude the District Court did not err in holding that Appellants' federal questions and claims in these proceedings were barred under the Doctrine of Res Judicata. *The valid and final judgment in Mirin-1 operates as an absolute bar to a second suit between the same parties or their privies based on the same cause of action not only in respect of every matter actually litigated, but also as to every ground of recovery or defense which might have been presented.*" 547 F.2d at 94. (Emphasis supplied.)

Numerous other cases supporting the principle that a dismissal for failure to state a claim is "on the merits" for *res judicata* purposes were referred to in defendants' opening memorandum in support of the present motion to dismiss. Def. Mem. 11-12.[8] Plaintiffs attempt to brush aside these cases (as well as other cases cited by defendants in other contexts) by pointing to irrelevant factual differences and nonexistent distinctions.

For example, plaintiffs seek to distinguish *Hall* v. *Tower Land and Investment Co.*, 512 F.2d 481 (5th Cir. 1975),[9] on the ground that "there was a specific finding of jurisdiction in

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[8] It is clear that the effect of this Court's prior dismissal of the related cases for *res judicata* purposes is governed by federal law. *Kern* v. *Hittinger*, 303 F.2d 333, 340 (2d Cir. 1962). Indeed, the quotation from Moore relied on by plaintiffs (Pl. Mem. 25-26) specifically states that the effect of a dismissal for *res judicata* purposes is determined by "the procedural law of the forum" — *i.e.*, the court rendering the judgment. Accordingly, although we believe that California law is essentially the same as federal, plaintiffs' extensive excerpts from a California treatise are not germane here.

[9] In *Hall*, the Court of Appeals held "that granting defendant's motion to dismiss for plaintiff's failure to state a claim upon which relief can be granted operates as an adjudication on the merits, and the appellate court will not go behind the order to determine precisely which issues the trial court decided." 512 F.2d at 483.

the district court." Pl. Mem. 7. But, as we have already noted, this Court clearly *had and exercised* jurisdiction over the prior cases involved here.

Similarly, plaintiffs urge this Court to ignore *Bartsch* v. *Chamberlin Co. of America, Inc.*, 266 F.2d 357 (6th Cir. 1959), on the grounds that that case involved "protracted litigation" and the prior action was dismissed "with prejudice." Pl. Mem. 8. But the prior action here was also dismissed with prejudice. There is nothing in the Sixth Circuit's *per curiam* opinion in *Bartsch* to suggest that the District Court had in fact used the magic words "with prejudice" in dismissing the prior suit; nor is there any indication that the litigation was "protracted."[10]

Moreover, it is noteworthy that, in quoting excerpts from 1B Moore, *Federal Practice* ¶ 0.409[1] (Pl. Mem. 25-26), plaintiffs jump from page 1003 to page 1009, leaving out the following clear statement of "blackletter law" on page 1005:

> "And *it is well settled that a judgment dismissing a complaint on a general demurrer or its modern substitute under the Federal Rules — a motion to dismiss for failure to state a claim upon which relief can be granted* — and without the reservation of any issue, *is presumed to be upon the merits*, unless the contrary appears of record or is stated in the decree, *and the judgment has the same effect of res judicata as though rendered after trial in a subsequent suit on the same claim.*" (Emphasis supplied.)

The dismissal in the prior cases in this Court was not based on jurisdictional grounds, nor was it based on failure to comply with a technical or procedural requirement of filing or pleading form. The dismissal followed a full exchange of pleadings, a full exchange of briefs and arguments on con-

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[10] No point will be served in reviewing case-by-case all the rambling and spurious "distinctions" urged by plaintiffs. Pl. Mem. 3-13. The cases cited by defendants speak for themselves, and each case fully supports the proposition for which it was cited.

trolling points of law, and a carefully considered opinion by this Court. Although they could have done so, plaintiffs did not urge their present theories while the action was pending, did not seek leave to amend the complaint, did not ask for a ruling that the dismissal be "without prejudice," did not seek rehearing, and did not appeal.

Under sound principles of judicial administration, there can be only one class or subclass recovery, if any, arising out of defendants' alleged conspiracy and overcharges. Litigation seeking that recovery originated in this Court and is now proceeding in the Ninth Circuit. Plaintiffs and their counsel have purposely excluded themselves from such litigation. They have no legitimate grounds for complaining when well established principles of law and sound judicial policy bar them from initiating duplicative and conflicting litigation. Indeed, any other result would open a Pandora's box by permitting any disappointed litigant to burden courts and opposing parties alike with repetitive complaints in which superficial and cosmetic changes have been made.

III

Conclusion

For the foregoing reasons and those stated in defendants' opening memorandum, defendants' motion should be granted and these cases should be dismissed on grounds of *res judicata*.

DATED: May 20, 1977

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-77-0576 SW

MARILYN MOITIE, et al.,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, et al.,

Defendants.

No. C-77-0577 SW

FLOYD R. BROWN, et al.,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, et al.,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION TO REMAND AND GRANTING DEFENDANTS' MOTION TO DISMISS

(Filed July 6, 1977)

Defendants have removed plaintiffs' actions to this Court and have moved for an order dismissing plaintiffs' complaints, which has been followed by plaintiffs' motion to remand. The disposition of these motions requires an extensive review and analysis of the origins and substance of these complaints.

Facts

On April 28, 1976, the United States filed a civil complaint and a criminal indictment against defendants in this present action, both of which alleged that defendants engaged

in a price fixing conspiracy from 1963 to April, 1974, in violation of Section 1 of the Sherman Act.[1] Plaintiff Moitie filed a class action complaint in Superior Court for Santa Clara County against the defendants in the present action on May 6, 1976. This first *Moitie* complaint also charged defendants with engaging in a price fixing conspiracy during the same period of time alleged by the government. The allegations of plaintiff Moitie relied heavily on those contained in the government's complaint. Specifically, plaintiff's allegations entitled "Trade and Commerce," "Offenses Charged," and "Effects," were almost verbatim repetitions of those prepared by the government. The significant difference is that plaintiff Moitie did not make reference to the Sherman Act, but instead charged defendants with violating Section 16720 of the California Business and Professions Code (the Cartwright Act). Plaintiff sought treble damages calculated on a base figure in excess of $5,000, fees and costs, and injunctive relief. Defendants subsequently removed plaintiff's action to this Court, claiming both diversity of citizenship and federal question jurisdiction, on June 1, 1976. Plaintiff did not move to remand her action to state court.

On June 15, 1976 plaintiff Brown filed a class action complaint in this Court against the defendants in the present action. Plaintiff Brown, also relying on the "Trade and Commerce," and "Offenses Charged," allegations contained in the government's complaint and indictment, charged defendants with engaging in a price fixing conspiracy during the same period alleged by the government, in violation of Section 1 of the Sherman Act, the same charge alleged by the government. Plaintiff Brown sought unspecified treble damages, fees and costs pursuant to Section 4 of the Clayton Act, and injunctive relief pursuant to Section 16 of the Act.

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[1] *United States* v. *Federated Dept. Stores, Inc., et al.*, C-76-858 RHS; *United States* v. *Federated Dept. Stores, Inc., et al.*, CR-76-236 SAW. The criminal action has been concluded; the civil action is still pending in this Court.

The *Moitie* and *Brown* cases were consolidated, along with five other related class actions, and defendants moved to dismiss all seven complaints for failure to state a claim on which relief could be granted. On January 11 and 12, 1977 this Court entered orders granting defendants' motion and dismissing all seven actions for failure to allege sufficient standing to sue. Specifically, the Court dismissed the Section 4 Clayton Act claims because the plaintiffs failed to show an injury to a competitive interest in a business in which they were engaged. The Section 16 claim was dismissed because the plaintiffs were not, under the circumstances of their suits, faced with irreparable injury which would entitle them to injunctive relief.

The five other cases appealed and are now pending in the Ninth Circuit. Plaintiffs Moitie and Brown chose not to appeal, and filed new class action complaints in state municipal court on February 13 and 17, 1977, respectively. These new complaints are also in many respects identical to those previously filed by the plaintiffs and to the complaint and indictment filed by the government. The new complaints are against the same defendants, allege the same unlawful act (engaging in a price fixing conspiracy) during the same time period (1963 to April, 1974), are brought on behalf of essentially the same classes of plaintiffs as the previous complaints,[2] and incorporate the same "Trade and Commerce," "Offenses Charged," and "Effects," allegations contained in the government complaint and indictment.

Unlike their previous complaints, the present Moitie complaint makes no mention of the Cartwright Act and the Brown complaint makes no reference to the Sherman and Clayton Acts. Instead, both complaints allege four identical causes of action — fraud and deceit, unfair business practices, civil conspiracy, and restitution of moneys had and received

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[2] The new Brown complaint adds four additional classes of plaintiffs residing in four California counties.

— which were not included in their previous complaints. The second Moitie and Brown complaints also differ from their first complaints in that injunctive relief is not sought and the amount of damages claimed is now not less than $600 per person.

Motion To Remand

Defendants have removed the second Moitie and Brown complaints to this Court on the basis of diversity of citizenship and federal question jurisdiction. In their motion to remand, plaintiffs concede diversity, but deny that the amount in controversy exceeds $10,000 and argue that their complaints do not assert claims arising under the Constitution or laws of the United States. As defendants correctly state in their opposition to plaintiffs' motion to remand, these complaints may be properly removed to this Court, regardless of the amount in controversy, if they could have been originally brought in a federal court without meeting any minimum amount in controversy (*Allen* v. *New York*, 15 F.2d 532, 533 (4th Cir. 1926). Wright, Federal Practice and Procedure, § 3725, P. 660). Defendants argue that since the present complaints arise under federal antitrust legislation, Title 28 U.S.C. § 1337,[3] which has no jurisdictional amount requirement, applies and plaintiffs' complaints may be removed without meeting the $10,000 amount in controversy requirement.

The issue concerning removal is then whether the plaintiffs are asserting claims which are founded on rights resting on federal antitrust laws, and which could have originally been brought in federal court without meeting any minimum amount in controversy.

It is an established principle that in the absence of a fraudulent purpose to defeat removal, the plaintiff by the

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[3] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337.

allegations of his complaint determines its status with respect to removability (*Great Northern Ry. Co.* v. *Alexander*, 246 U.S. 276 [1918]). Removability does not depend on any allegations which defendant might make in a responsive pleading or in his removal petition (*Chrysler Credit Corp.* v. *Ralph Williams Gulfgate Chrysler-Plymouth*, 329 F.Supp. 644, 647 [S.D. Tex. 1971]). Accordingly, a plaintiff may defeat removal to the federal courts by avoiding allegations which provide a basis for the assertion of federal jurisdiction (*Jones* v. *General Tire & Rubber Co.*, 541 F.2d 660 [7th Cir. 1976]), but a plaintiff may not defeat removal by employing artful pleading to cast his claim, the essence of which is a federal right, in terms of state law (*State of New York* v. *L. 1115 J. Bd., N.H. & HED*, 412 F.Supp 720, 722 [E.D. N.Y. 1976]).

As noted in the analysis section above, allegations contained in the civil complaint and criminal indictment originally filed by the United States against defendants have remained consistent elements of the first and second complaints filed by plaintiffs Moitie and Brown. In relying on these allegations, plaintiff Moitie cast the character, and hence determined the removability status, of her first complaint. Although the first Moitie complaint asserted a violation of California state law, defendants removal to this Court was not met by plaintiff's motion to remand, though this option was considered by plaintiff's counsel.[4] The first Brown complaint was subsequently filed with this Court, alleging exactly the offense (violation of Section 1 of the Sherman Act) as was alleged in the complaint and indictment filed by the United States.

Just as plaintiff Moitie cast the character and determined the removability status of her first complaint by relying on

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[4] During the proceedings on defendants' motion to extend time to answer plaintiff's complaint, the following colloquy took place:

"Judge Renfrew: . . . You say you think you have a basis for a motion to remand?

"Mr. Offstein (Counsel for Moitie): I would like to find out if there are facts upon which to found a basis." (Transcript, June 3, 1976, p. 11).

allegations contained in the complaint and indictment filed by the United States, plaintiffs Moitie and Brown have now done the same with respect to their second complaints by their continued reliance on these government allegations. Artful pleading by plaintiffs which adds four new state causes of action and deletes specific reference to violations of federal antitrust laws cannot convert their essentially federal law claims into state law claims. From start to finish, plaintiffs have essentially alleged violations by defendants of federal antitrust laws. Plaintiffs complaints were properly removed to this Court because they concerned federal questions which could have been originally brought in Federal District Court without satisfying any minimum amount in controversy. Therefore, plaintiffs motion to remand to state court is denied.

Motion To Dismiss

The above analysis of plaintiffs' first and second complaints demonstrates that they involve the same parties, the same alleged offenses, and the same time periods. This Court dismissed plaintiffs' first complaints for failure to allege sufficient standing to sue. Given the similar identity of the first and second complaints, the doctrine of *res judicata* requires the application of the dismissal of the first complaints to their successors which are now before the Court. Defendants' motion to dismiss plaintiffs' complaints is granted.

IT IS SO ORDERED.

DATED: June 30, 1977

/s/ Spencer Williams
SPENCER WILLIAMS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576 SW

MARILYN MOITIE, et al.,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, et al.,

Defendants.

NO. C-77-0577 SW

FLOYD R. BROWN, et al.,

Plaintiffs,

v.

FEDERATED DEPARTMENT STORES, et al.,

Defendants.

Judgment

(Filed July 6, 1977)

IT IS ORDERED that judgment be entered for defendants.

DATED: June 30, 1977

/s/ SPENCER WILLIAMS
United States District Judge

Original Decision of the Court of Appeals
Filed November 1, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3101

[Do Not Publish]

MARILYN MOITIE, Individually, and on behalf of others similarly situated, *Appellants*,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX, *Appellees*.

FLOYD R. BROWN, Individually, and on behalf of others similarly situated, *Appellants*,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO. and BULLOCK'S; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX, *Appellees*.

Appeal from the United States District Court for the Northern District of California

MEMORANDUM

Before: WRIGHT and TANG, Circuit Judges, and JAMESON, Senior District Judge.*

This appeal presents a complex and novel issue related to the doctrine of *res judicata*: when several cases are consolidated for trial with some but not all of the plaintiffs appealing successfully, is the first decision *res judicata* as to those plaintiffs who did not appeal? Under the facts of this

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* Of the District of Montana.

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case, we hold that the interests of justice require that the entire decision be rendered inoperative, and we therefore reverse and remand.

FACTS

In April 1976 the government brought antitrust actions against defendant department stores alleging price fixing on women's clothing in northern California. Shortly thereafter several private parties filed antitrust actions against the same defendants, incorporating the government's allegations in their complaints.

Appellant Moitie filed a complaint in state court in May 1976 (Moitie I). Defendants removed the action to federal court, where it was consolidated with several related actions, including that of appellant Brown.

In January 1977 the district court decided the consolidated case for the defendants. The decision is reported at 426 F. Supp. 880. The district judge held that the plaintiffs, as private parties, lacked standing to sue under § 4 of the Clayton Act, 15 U.S.C. § 15. He dismissed the complaints for failure to allege specific standing to sue.

Only five of the seven losing plaintiffs appealed. Appellants Moitie and Brown did not.

While the five appeals were pending before this court, the Supreme Court decided *Reiter* v. *Sonotone Corp.*, _____ U.S. _____, 99 S. Ct. 2326 (1979). The Court held that a private party *may* have standing to sue for antitrust violations under § 4 of the Clayton Act. Pursuant to *Reiter*, we reversed and remanded the five cases pending before us, for a determination in the trial court consistent with *Reiter*.[1]

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[1] The original consolidated case is reported under the name *Weinberg* v. *Federated Department Stores*. This court reversed the trial court by an order filed June 25, 1979, which read:

> Following oral argument on December 7, 1978, this court ordered that submission of this appeal should be withheld pending action by the United States Supreme Court in *Reiter*

As noted, appellants Moitie and Brown did not appeal the 1977 decision. Rather, they filed new actions in state court, alleging state causes of action for defendant's price-fixing. Defendants moved for removal to federal court, asserting that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants and removed the actions. It then dismissed them on the basis of *res judicata*, these parties and their claims having already been decided in *Moitie I*. Judgment of dismissal was entered on July 7, 1977.

ISSUES PRESENTED[2]

Appellants first contend that removal was improper because they stated a valid state claim. We disagree. The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part. In light of our disposition of this appeal, appellants will not quarrel with the result.

The controlling issue is the continuing validity of *Moitie I* for *res judicata* purposes. Now that the decision in *Moitie I* has been effectively reversed by this court, should the decision in *Moitie II* which cited *Moitie I* as *res judicata* also be reversed?

RES JUDICATA

We begin with the rule of law that, when a decision has been reversed on appeal, it cannot control subsequent cases as

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v. *Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978). On June 11, 1979 the Supreme Court decided *Reiter* v. *Sonotone Corp.*, _____ U.S. _____, 47 U.S.L.W. 4672.

IT IS ORDERED that the judgments of the district court are reversed, and the cause is remanded for further proceedings in light of *Reiter* v. *Sonotone Corp.*

[2] The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so.

res judicata. The Supreme Court implied this in *Butler* v. *Eaton*, 141 U.S. 240 (1891). The present doctrine is summarized by Professor Moore:

> When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.

1B *Moore's Federal Practice* (2d ed.) ¶ 0.416[2], p. 2231.[3]

Under this doctrine, if appellants had appealed from the judgment in *Moitie I*, we would now reverse it in *Moitie II*. Because they did not appeal *Moitie I*, however, that judgment has technically never been reversed as to them. A strict application of the doctrine of *res judicata* would preclude our review of the instant decision.

Such a technical application of the doctrine ignores the obvious fact that the decision in *Moitie I*, if not the judgment as to these two appellants, has been reversed. Such technical application of procedural rules defeats our real purpose, which is to do justice. As with the other five plaintiffs whose cases were consolidated in *Moitie I*, appellants Brown and Moitie should have their day in court. Had the district court known of the Supreme Court's disposition in *Reiter*, and of our subsequent reversal of *Moitie I*, it would not have dismissed the instant actions on *res judicata* grounds.

An appellate court must do what is necessary to render substantial justice. *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944). "In disposing of cases before us it is our responsibility

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[3] The same conclusion was reached in *McDonald* v. *McDonald*, 53 Wis.2d 371, 192 N.W.2d 903 (1972):

> The reversal of a judgment which is a basis of a claim of res judicata in a later action warrants reversal of the finding of res judicata in the later action.

192 N.W.2d at p. 912.

to make such disposition as justice may require." *Id.*, at p. 156. Because the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed.[4] We remand to the district court for proceedings consistent with the holding in *Reiter*, *supra*.

REVERSED AND REMANDED.

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[4] We are also mindful of the fact that *Moitie I* was dismissed for want of standing to sue. No court has ever considered these actions on the merits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3101

MARILYN MOITIE, Individually, and on behalf of others similarly situated,

Appellants,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA; SAKS & COMPANY, d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Appellees.

FLOYD R. BROWN, Individually, and on behalf of others similarly situated,

Appellants,

v.

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO. and BULLOCK'S; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Appellees.

Appeal from the United States District Court for the Northern District of California

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PETITION FOR REHEARING

(Filed November 28, 1979)

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TABLE OF AUTHORITIES

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Annat v. *Beard*, 277 F.2d 554 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960) .....

Barzin v. *Selective Service Local Board No. 14*, 446 F.2d 1382 (3d Cir. 1971) .....

Butler v. *Eaton*, 141 U.S. 240 (1891) .....

Clouatre v. *Houston Fire & Cas. Co.*, 229 F.2d 596 (5th Cir. 1956) .....

Hester v. *Woodruff*, 327 U.S. 726 (1946) .....

Reed v. *Allen*, 286 U.S. 191 (1932) .....

Ripperger v. *A.C. Allyn & Co.*, 113 F.2d 332 (2d Cir.), *cert. denied*, 311 U.S. 695 (1940) .....

Steward Securities Corp. v. *Guaranty Trust Co.*, 597 F.2d 240 (10th Cir. 1979) .....

Title v. *United States*, 263 F.2d 28 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959) .....

PETITION FOR REHEARING

Appellees respectfully petition this Court for rehearing of the decision entered herein on November 15, 1979, reversing the district court's dismissal of these cases on grounds of *res judicata*.

That decision was predicated upon this Court's determination of a legal issue which was not briefed or argued by the parties — namely, whether the reversal on appeal of the five related *Weinberg* cases should preclude the normal application of *res judicata* to the dismissal of the first *Moitie* and *Brown* cases, from which no appeal was taken.[1]

More importantly, this Court's holding with respect to that issue is in conflict with the controlling decisions of the Supreme Court and other established precedents. As we discuss below, it is well settled that a party who deliberately determines not to appeal from an adverse judgment cannot escape the *res judicata* effects of that judgment, even if a closely related or consolidated judgment is subsequently reversed on appeal. *See Reed* v. *Allen*, 286 U.S. 191 (1932); *Ackerman* v. *United States*, 340 U.S. 193 (1950); *Annat* v. *Beard*, 277 F.2d 554 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960). If the law were otherwise, whenever a district court decision applied to a number of cases, only one party would have to appeal, leaving the others free to pursue other courses of action, comfortable in the knowledge that they would still benefit from any reversal, notwithstanding their calculated avoidance of the court of appeals. The finality of judicial determinations which the doctrine of *res judicata* seeks to secure would be seriously jeopardized by such a distortion of the appellate process.

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[1] We respectfully note that, contrary to the statement in footnote 2 to the Court's opinion, the parties did brief the general issue of *res judicata*. *See* Brief of Appellees, pp. 2, 11-12, 27-39. However, we are aware of no invitation to brief the specific issues on which the Court based its decision. Moreover, in light of the Supreme Court decisions and other precedents discussed herein, the parties could not have anticipated that the Court would be interested in the question of the impact of the reversal of the appealed cases upon the unappealed *Moitie* and *Brown* cases.

Reed v. *Allen, supra*, involved a series of lawsuits concerning disputed rights to certain real estate, the determination of which depended upon the construction of a particular will:

Case No. 1 — In the first action, A and B were required to interplead their claims for the rents collected on the disputed property. The trial court ruled that B was the proper owner under the will, and A appealed.

Case No. 2 — While the appeal was pending, B brought an action in ejectment against A to obtain a declaration of title to the property. Relying solely on the judgment in the first action, the trial court granted B the relief sought. A could have appealed, but chose not to do so.

Reversal of Case No. 1 — Subsequently, the appellate court reversed the decision in the first action, which A had appealed, and held that A, not B, was the proper owner of the disputed property and therefore entitled to the rents.

Case No. 3 — Following this decision, A brought a suit against B for ejectment, claiming that title to the property should be his, in accordance with the appellate decision in Case No. 1. The Supreme Court held that this action was barred, on grounds of *res judicata*, by virtue of the decision in Case No. 2, which A failed to appeal. Even though the judgment in Case No. 2 was based entirely on the judgment in Case No. 1, which was later reversed, A's failure to appeal rendered the judgment in Case No. 2 a bar to his obtaining relief in the third suit.

The Court made it clear that, had A appealed the decision in Case No. 2, he could have been relieved of the effect of that judgment. But his failure to appeal required application of the principles of *res judicata*. The Court stated (286 U.S. at 198):

> "The judgment in the ejectment action [Case No. 2] was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. . . . [I]t is hardly necessary to say that jurisdiction

to review one judgment gives an appellate court no power to reverse or modify another and independent judgment. If respondent, in addition to appealing from the decree [Case No. 1], had appealed from the judgment [Case No. 2], the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton*, 141 U.S. 240. But this course respondent neglected to follow."

The present case is an even stronger one than *Reed* for application of *res judicata*. There might have been a strong justification for avoiding *res judicata* in *Reed* in order definitively to resolve the issue of title to the disputed property, but no such justification exists here. Moreover, plaintiffs here seek to be the windfall beneficiaries of an appellate reversal procured by other parties, not, as in *Reed*, a reversal in a related case procured by the same affected party. Additionally, the failure to appeal in *Reed* may have been caused by negligence or a mistaken belief that A had adequately protected his rights by the first appeal. Here the failure to appeal was a deliberate, calculated act, as part of appellants' attempt to circumvent the district court's judgment and bring their camouflaged antitrust claims into state court. If a relaxation of the doctrine of *res judicata* for sympathetic reasons was not deemed permissible in *Reed, a fortiori*, the overriding of so basic a doctrine is not permissible here. As the Supreme Court has made clear, there is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata* . . . ." *Hester* v. *Woodruff*, 327 U.S. 726, 733 (1946).

A conscious decision not to appeal was also the critical factor in the Supreme Court's decision in *Ackerman* v. *United States*, 340 U.S. 193 (1950). In that case, three related individuals had been ordered deported on the ground that they had procured their naturalization by fraud. Their cases had been consolidated in the trial court, and the evidence was essentially the same for all three. One of them, Keilbar, appealed; the Ackermans did not appeal. After Keilbar won a reversal on his appeal, the government having stipulated that

it had not presented sufficient evidence, the Ackermans sought to reopen the judgments against them. They argued that, as reflected in the decision on Keilbar's appeal, the judgments were erroneous, and they offered various grounds to justify their failure to appeal. However, the Supreme Court refused to grant the requested relief. It held that — in light of their "voluntary, deliberate, free, untrammeled choice . . . not to appeal" (340 U.S. at 200) — the petitioners were bound by the judgments against them, notwithstanding the fact that the result would have been different had they chosen to appeal.

The same principles were relied upon to support the application of *res judicata* in another case analogous to the case at bar, *Annat* v. *Beard*, 277 F.2d 554 (5th Cir.), *cert. denied*, 364 U.S. 908 (1960). Annat was the defendant in one of several condemnation proceedings brought by the United States to acquire land for a national park. In these proceedings, which were tried together before the same district court, two different survey maps were offered to describe the various tracts in question. The district court adopted survey A, which designated a twenty percent smaller area for Annat's land than survey B. Several defendants appealed from the final judgment of condemnation, but Annat did not appeal. On appeal, the Fifth Circuit held that survey B should have been adopted as the basis for determining the land taken and the amount of compensation. Thereafter, Annat brought an action for ejectment against the park superintendent, claiming that he was in unlawful possession of that portion of the land shown as belonging to Annat on survey B, but not on survey A. The district court granted summary judgment against Annat and also denied a motion for relief from the original condemnation judgment. The court of appeals affirmed.

The court assumed that, if Annat had appealed from the original judgment, "she would have obtained the same successful result as did the appealing defendants. . . . But Mrs. Annat did not appeal." (277 F.2d at 558.) The court noted that "*[a] reversal on appeal does not inure to the*

benefit of those who did not join in the appeal unless the interests of the non-appealing parties are so interwoven and dependent as to be inseparable." (*Id.*) (Emphasis supplied.) Accordingly, the court concluded that "the principle of res judicata requires us to hold that the situation of Mrs. Annat is not bettered by the . . . reversal" obtained by those defendants who did appeal. (277 F.2d at 559.)[2]

This Court's conclusion in the pending cases that "justice" would require nonapplication of *res judicata* "[b]ecause the instant dismissal rested on a case that has been effectively overruled" (Opinion at 4) is inconsistent with the foregoing controlling authorities. Indeed, the Supreme Court squarely rejected this rationale in *Reed*. The Court noted that "[t]he predicament in which respondent finds himself is of his own making," the result of his failure to preserve his position

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[2] These principles have been consistently applied by the courts. *See Clouatre* v. *Houston Fire & Cas. Co.*, 229 F.2d 596, 597-98 (5th Cir. 1956):

> "The most that can be argued by appellant is that the judgment dismissing the former complaint was wrong as a matter of law [in light of the Supreme Court's subsequent reversal of a similar case], but appellant did not avail herself of her right to have the judgment corrected on appeal. And it is settled that such a mistake in the rendition of a judgment does not vitiate the judgment and does not obviate the application of the doctrine of *res judicata*."

See also Stewart Securities Corp. v. *Guaranty Trust Co.*, 597 F.2d 240, 241-42 (10th Cir. 1979); *Barzin* v. *Selective Service Local Board No. 14*, 446 F.2d 1382, 1383 (3d Cir. 1971)("The duty to appeal the adverse decision remained with the appellant, and his failure to do so leaves . . . [the prior determination] as a decision entitled to recognition as res judicata"); *Title* v. *United States*, 263 F.2d 28, 30 (9th Cir.), *cert. denied*, 359 U.S. 989 (1959) (had Title appealed from the original judgment, the Court would have reversed, but since he did not do so, "[h]e is in the same status as any other individual who fails to protect fully his valid legal rights by neglecting to perfect his appeal"); *Ripperger* v. *A.C. Allyn & Co.*, 113 F.2d 332, 334 (2d Cir.), *cert. denied*, 311 U.S. 695 (1940) ("No appeal having been taken, the former decision stands as a conclusive determination of . . . [the decided] issue between the parties").

by appeal. (286 U.S. at 198.)[1] The Court went on to state (286 U.S. at 198-99):

> "Having so failed, we can not be expected, for his sole relief, to upset the general and well established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation — a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton*, 98 U.S. 61, 65, 68-69."

The same reasoning applies here. As far as "doing justice" in the present case is concerned, it is questionable whether it is necessary, or even proper under Rule 23, to pile additional alleged class actions with another putative class attorney on top of the five cases now proceeding in the district court. The most substantial beneficiary of this Court's decision is plaintiffs' counsel, whose potential fee far exceeds any individual putative class member's potential recovery. Plaintiffs' counsel made a calculated decision not to appeal the original dismissal of his cases, in a deliberate attempt to segregate those cases from the other related cases and circumvent the district court's adverse judgment. We seriously question whether, in these circumstances, "justice" requires his re-entry into the proceedings, now being actively advanced by other counsel.

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[1] The Supreme Court observed that the necessity of taking an appeal in order to protect against the application of *res judicata* was "the course which the decision of this court in *Butler* v. *Eaton*, [141 U.S. 240 (1891)] had plainly pointed out." 286 U.S. at 198. This Court also made note of the *Butler* decision in its opinion in the present case. (Opinion at 3.)

More significantly, if allowed to stand and if consistently applied, this Court's decision could give rise to substantial abuses of the judicial process. As noted above, the decision would encourage losing parties in related cases — whether consolidated or not[4] — to choose one among their number to prosecute an appeal, while the other losing parties would be free to file other actions, or to do nothing, knowing that, if the result of the single appeal is favorable, it will redound to their benefit as well. The doctrine of bringing peace and an end to litigation, long established in our jurisprudence, would thus be substantially undermined.

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[4] Contrary to the statement in the Court's Opinion, pp. 1, 2, the seven cases originally dismissed in the district court were *not* consolidated at that time. They were assigned to a single judge under the local related case rule. It was only *after* the remand of the five *Weinberg* cases by this Court that the cases were consolidated.

Conclusion

For the foregoing reasons, we respectfully submit that the Court should grant the petition for rehearing and affirm the decision of the district court dismissing these cases on grounds of *res judicata*.

Respectfully submitted,

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On Behalf of Defendants-Appellees

DATED: November 28, 1979

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 77-3101

MARILYN MOITIE, Individually, and on behalf of others similarly situated,

Appellants,

v

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO., and BULLOCK'S NORTHERN CALIFORNIA: SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Appellees,

FLOYD R. BROWN, Individually, and on behalf of others similarly situated,

Appellants,

v

FEDERATED DEPARTMENT STORES, INC., d/b/a I. MAGNIN & CO. and BULLOCK'S; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE; and DOES I through XX,

Appellees.

ORDER

(Filed January 2, 1980)

Appeal from the United States District Court for the Northern District of California

Before: WRIGHT and TANG, Circuit Judges, and JAMESON Senior District Judge.

The Petition for Rehearing has been considered and is denied.

Costs on appeal will be borne by the respective parties and none will be taxed.

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Order and Substituted Decision of the Court of Appeals Filed January 15, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3101

MARILYN MOITIE and FLOYD R. BROWN, Individually and on behalf of others similarly situated, *Appellants*,

v.

FEDERATED DEPARTMENT STORES, INC., dba I. MAGNIN & CO., and BULLOCKS NORTHERN CALIFORNIA; SAKS & COMPANY d/b/a SAKS FIFTH AVENUE, and DOES I through XX, *Appellees*.

Before: WRIGHT and TANG, Circuit Judges, and JAMESON, Senior District Judge.

The Memorandum disposition filed November 15, 1979 is ordered withdrawn.

The attached authored Opinion is substituted for it.

* * *

WRIGHT, Circuit Judge:

This appeal presents a complex and novel issue related to the doctrine of *res judicata*: when several cases are consolidated for trial with some but not all of the plaintiffs appealing successfully, is the first decision *res judicata* as to those plaintiffs who did not appeal? Under the facts of this case, we hold that the interests of justice require that the entire decision be rendered inoperative, and we therefore reverse and remand.

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FACTS

In April 1976 the government brought antitrust actions against defendant department stores alleging price fixing on women's clothing in northern California. Shortly thereafter several private parties filed antitrust actions against the same defendants, incorporating the government's allegations in their complaints.

Appellant Moitie filed a complaint in state court in May 1976 (Moitie I). Defendants removed the action to federal court, where it was consolidated with several related actions, including that of appellant Brown.

In January 1977 the district court decided the consolidated case for the defendants. The decision is reported at 426 F. Supp. 880. The district judge held that the plaintiffs, as private parties, lacked standing to sue under § 4 of the Clayton Act, 15 U.S.C. § 15. He dismissed the complaints for failure to allege specific standing to sue.

Only five of the seven losing plaintiffs appealed. Appellants Moitie and Brown did not.

While the five appeals were pending before this court, the Supreme Court decided *Reiter* v. *Sonotone Corp.*, _____U.S. _____, 99 S. Ct. 2326 (1979). The Court held that a private party *may* have standing to sue for antitrust violations under § 4 of the Clayton Act. Pursuant to *Reiter*, we reversed and remanded the five cases pending before us for a determination in the trial court consistent with *Reiter.*[1]

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[1] The original consolidated case is reported under the name *Weinberg* v. *Federated Department Stores*, 426 F.Supp. 880 (N.D. Cal. 1977). This court reversed the trial court by an order filed June 25, 1979, which read:

> Following oral argument on December 7, 1978, this court ordered that submission of this appeal should be withheld pending action by the United States Supreme Court in *Reiter* v. *Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978). On June 11, 1979 the Supreme Court decided *Reiter* v. *Sonotone Corp.*, _____ U.S. _____, 47 U.S.L.W. 4672.
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> It Is Ordered that the judgments of the district court are reversed, and the cause is remanded for further proceedings in light of *Reiter* v. *Sonotone Corp.*

As noted, appellants Moitie and Brown did not appeal the 1977 decision. Rather, they filed new actions in state court, alleging state causes of action for defendant's price-fixing. Defendants moved for removal to federal court, asserting that the state law claims were really disguised federal antitrust claims. The district court agreed with defendants and removed the actions. It then dismissed them on the basis of *res judicata*, these parties and their claims having already been decided in *Moitie I*. Judgment of dismissal was entered on July 7, 1977.

ISSUES PRESENTED[2]

Appellants first contend that removal was improper because they stated a valid state claim. We disagree. The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part. In light of our disposition of this appeal, appellants will not quarrel with the result.

The controlling issue is the continuing validity of *Moitie I* for *res judicata* purposes. Now that the decision in *Moitie I* has been effectively reversed by this court, should the decision in *Moitie II* which cited *Moitie I* as *res judicata* also be reversed?

RES JUDICATA

We begin with the rule of law that, when a decision has been reversed on appeal, it cannot control subsequent cases as *res judicata*. The Supreme Court implied this in *Butler* v. *Eaton*, 141 U.S. 240 (1891). The present doctrine is summarized by Professor Moore:

> When a judgment has been subjected to appellate review, the appellate court's disposition of the judgment generally provides the key to its continued force as res

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[2] The parties have devoted their briefs and oral arguments to the removal issue. They have not briefed the *res judicata* question, even after invitation to do so.

> judicata and collateral estoppel. A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.

1B *Moore's Federal Practice* (2d ed.) ¶ 0.416[2], p. 2231.[3]

Under this doctrine, if appellants had appealed from the judgment in *Moitie I*, we would now reverse it in *Moitie II*. Because they did not appeal *Moitie I*, however, that judgment has technically never been reversed as to them. A strict application of the doctrine of *res judicata* would preclude our review of the instant decision.

Such a technical application of the doctrine ignores the obvious fact that the decision in *Moitie I*, if not the judgment as to these two appellants, has been reversed. Such technical application of procedural rules defeats our real purpose, which is to do justice. As with the other five plaintiffs whose cases were consolidated in *Moitie I*, appellants Brown and Moitie should have their day in court. Had the district court known of the Supreme Court's disposition in *Reiter*, and of our subsequent reversal of *Moitie I*, it would not have dismissed the instant actions on *res judicata* grounds.

It is well-established that non-appealing parties may benefit from a reversal when their position is closely interwoven with that of appealing parties. *See, e.g., Kvenild* v. *Taylor*, 594 P.2d 972, 978 (Wyo. 1979); *Ford Motor Credit Co.* v. *Uresti*, 581 S.W.2d 298, 300 (Tex. 1979); *In Re Estate of McDill*, 14 Cal.3d 831, 840, 122 Cal. Rptr. 754, 759, 537 P.2d 874 (1975).

In this case the appealing and non-appealing parties' positions are identical. There are no factual differences

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[3] The same conclusion was reached in *McDonald* v. *McDonald*, 53 Wis.2d 371, 192 N.W.2d 903 (1972):

> The reversal of a judgment which is a basis of a claim of res judicata in a later action warrants reversal of the finding of res judicata in the later action.

192 N.W.2d at p. 912.

because the lower court did not reach the merits, holding as a matter of law that consumers had no standing to bring these antitrust actions.

The fact that this court could have reversed the judgments against Moitie and Brown when it reversed *Weinberg*, distinguishes the case from those cited by appellees. In *Reed* v. *Allen*, 286 U.S. 191 (1932), there were two separate but related cases. The first concerned the right to rents from certain property. The second was an ejectment action brought by the successful party in case 1. Case 1 was appealed and reversed and case 2 was not appealed. When the successful appellant in case 1 brought a new ejectment action, the court held that the suit was barred by *res judicata* because case 2 had not been appealed.

Here by contrast, the underlying case was successfully appealed. As noted, this court could reverse even as to non-appealing parties. In *Reed* the court which reversed case 1 had no jurisdiction to reverse case 2. The other cases cited by appellees are similarly distinguishable.

The doctrine of *res judicata* must, in rare instances, give way to overriding concerns of public policy and simple justice. *See, e.g., La Societe Anonyme des Parfums LeGalion* v. *Jean Patou, Inc.*, 495 F.2d 1265, 1276 (2d Cir. 1974); 1B *Moore's Federal Practice* (2d ed. ¶ 0.405[11], p. 783. To apply the doctrine here would ignore common sense and simple justice. The trial court's initial determination that these plaintiffs had no standing to sue has been overruled by the Supreme Court and by this court. Only a hypertechnical application of a judicially-created doctrine would deny them their day in court.

An appellate court must do what is necessary to render substantial justice. *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944). "In disposing of cases before us it is our responsibility to make such disposition as justice may require." *Id.*, at p.

156. Because the instant dismissal rested on a case that has been effectively overruled, justice requires that the dismissal be reversed.[4] We remand to the district court for proceedings consistent with the holding in *Reiter, supra*.

REVERSED AND REMANDED.

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[4] We are also mindful of the fact that *Moitie I* was dismissed for want of standing to sue. No court has ever considered these actions on the merits.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-77-0576 SW

MARILYN MOITIE, individually, and not on behalf of others similarly situated,

Plaintiff,

v.

FEDERATED DEPARTMENT STORES, doing business as I. MAGNIN & Co. and BULLOCK'S; SAKS & Co. doing business as SAKS FIFTH AVENUE; and DOES 1 through XX,

Defendants.

Notice of Dismissal; Reason Therefor, and (Proposed) Order

(Filed May 12, 1980)

To: Attorneys for Defendants in this action:

PLEASE TAKE NOTICE that this action is hereby dismissed, without prejudice to either the dismissing representative Plaintiff nor to the asserted class.

This dismissal is pursuant to Federal Rules of Civil Procedure 41(a)(1) and 23(e), 28 U.S.C.

The requisites of rule 41(a)(1) are met in that no answer or counterclaim has been filed as to the instantly dismissed complaint.

The requisites of rule 23(e) are met by the following:

(a) agreement to this procedure by the Court at the Pretrial Conference on April 15, 1980;

(b) agreement between the parties' attorneys that any salient rights Ms. Moitie may have will be recognized in the related WEST COAST DEPARTMENT STORE ANTITRUST LITIGATION, C-79-2724 SW, now pending before this Court;

(c) recognition by the parties' attorneys that Plaintiff's counsel will seek compensation fees and/or costs of suit at the appropriate time, and

(d) no class notice is required since no classwide rights are affected by this dismissal, and because Ms. Moitie's rights are to be preserved pursuant to subparagraph (b), *supra*, and because this dismissal is filed to avoid duplication of effort and expense in the WEST COAST DEPARTMENT STORE ANTITRUST LITIGATION.

DATED: May 7, 1980 at San Francisco, California.

Respectfully submitted,

LAW OFFICES OF JERROLD N. OFFSTEIN
JERROLD N. OFFSTEIN
MICHAEL WEISBERG

/s/ BY JERROLD N. OFFSTEIN

FOR GOOD CAUSE APPEARING, IT IS SO ORDERED.

DATED: May 12, 1980

/s/ SPENCER WILLIAMS
United States District Judge